# MEDIA FREEDOM IN AN AFRICAN STATE: NIGERIAN LAW IN ITS HISTORICAL AND CONSTITUTIONAL CONTEXT

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by

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# A B S T R A C T

## MEDIA FREEDOM IN AN AFRICAN STATE: NIGERIAN LAW IN ITS HISTORICAL AND CONSTITUTIONAL CONTEXT

Freedom of the media, a subject of wide-ranging current international debate, is of vital contemporary importance in developed and developing countries alike. International and national guarantees of media freedom illustrate the increasing recognition of its importance: but demonstrate also the difficulty of balancing media freedom against competing interests.

Nigeria, arguably the most influential of the new African states, is a richly revealing subject for the study of media freedom, for it combines a legacy of English colonial law with the recent adoption (in 1979) of a constitution loosely patterned on that of the United States of America: and which accords continued recognition to guarantees of fundamental rights (including freedom of expression) which were originally introduced before Nigerian independence (in 1960) and which served thereafter as a model for similar guarantees adopted by many of the new states of the Commonwealth.

The thesis provides a brief overview of the laws which govern the media in Nigeria, and then examines selected rules in their constitutional context, considers their defects and analyses the extent to which they impose

unjustifiable restrictions on freedom of the media. Recommendations are made for the reform of the law: in some cases, but certainly not all, by following English developments and - more generally - by adopting the approach taken in the United States of America to analogous problems of media freedom.

The laws examined are those governing media licensing and regulation; sedition; defamation (civil and criminal); and contempt of court (especially the sub judice rule, publications 'scandalising' the court, the reporting of judicial proceedings by the media and the obligation of journalists to disclose the identity of their sources). Within each topic, the relevant Nigerian rules are described (with reference to both legislation and case law), important developments in the United Kingdom are analysed, and the approach of the United States of America to these questions is contrasted.

In conclusion, it is submitted that Nigeria should adopt the various reforms suggested: and the significance of such development for other Commonwealth countries (with similar laws governing media freedom) is considered.

## PREFACE

I should like to explain, in more personal terms, my reasons for embarking on this study. I grew up in another African state in which scant regard has been accorded human rights and in which freedom of the media (though much vaunted) lies always subject to the heavy hand of government control. The majority of people are illiterate and are still struggling to attain the skills demanded in modern industrial society. From an early age I was struck by the importance with which many regarded the radio: and by the vital role this medium is capable of playing in education and development. I also felt deeply disturbed at the impact of government propaganda on broadcasting services; and by the need for free media to explore alternatives to government policies and to promote understanding and good will between different groups within the population. Hence, when I embarked on what I originally hoped would be an exposition of a full range of human rights (both political and social) and quickly realised that constraints of time and space demanded further specialisation, I chose to concentrate on the laws which restrict and restrain the media freedom I had long considered so important.

I was struck by the harshness of the common law within this sphere in a number of respects, and at

its departure from generally accepted principles of civil and criminal liability - to impose a heavy burden of rebuttal on the defendant in both categories of proceedings. I was greatly encouraged to note that the United States of America - beginning from essentially the same common law foundation - had constructed a system (primarily through decisions of its Supreme Court) in which media freedom is strongly supported; and many rules of the common law militating against it have been rejected or restricted. I felt profoundly conscious of the fact that these same common law rules have been carried to many areas of the world through Britain's former position as a colonial power: and that they presently govern (subject, of course, to local modification) some one quarter of the world's population.

I decided, therefore, to embark on a comparative analysis: with the aim of drawing together some of the more important common law rules as they affect the media, of identifying their shortcomings and (in the light of United States' experience) of suggesting reforms which (it is hoped) will serve to promote greater media freedom to the ultimate benefit of all whom the present rules affect. The project I have attempted is thus ambitious indeed: and I hope that I have achieved at least some small part of my aim.

I should like to express my thanks to my supervisor, Professor James S Read, of the School of Oriental and

African Studies, for whose stimulation, encouragement and help I will always be endebted. I should also like to convey my gratitude to the British Council and the trustees of the Freda Lawenski Scholarship, without whose financial assistance this study would not have been possible. I should also like to thank the trustees, staff and inmates of William Goodenough and London Houses for the stimulating social environment in which I have spent the last two years. I should also like to express my sincere appreciation to the staff of the Institute of Advanced Legal Studies, for according me facilities without which this study could not have been completed within this two-year period. I should like to thank Mrs Tashnin Chaudhary and Ms Clare Savaryn for their hours of labour in typing this final version. I should like to record a special vote of thanks to Professor Robert C Cole who, despite many demands on his own time, has proof-read the entire work. I should also like to thank my parents and my sister, Margie, for their constant encouragement and support. And, last but by no means least, I should like to thank all the friends who have stood by me in times of difficulty, especially Mella Keohane, Bill Moodie and Debbie Weinrauch.

I have endeavoured to describe the law in accordance with my understanding of the sources available to me as at 1 January 1983; and all errors and omissions are, of course, entirely my own.

Anthea J Jeffery London, 31 July, 1983

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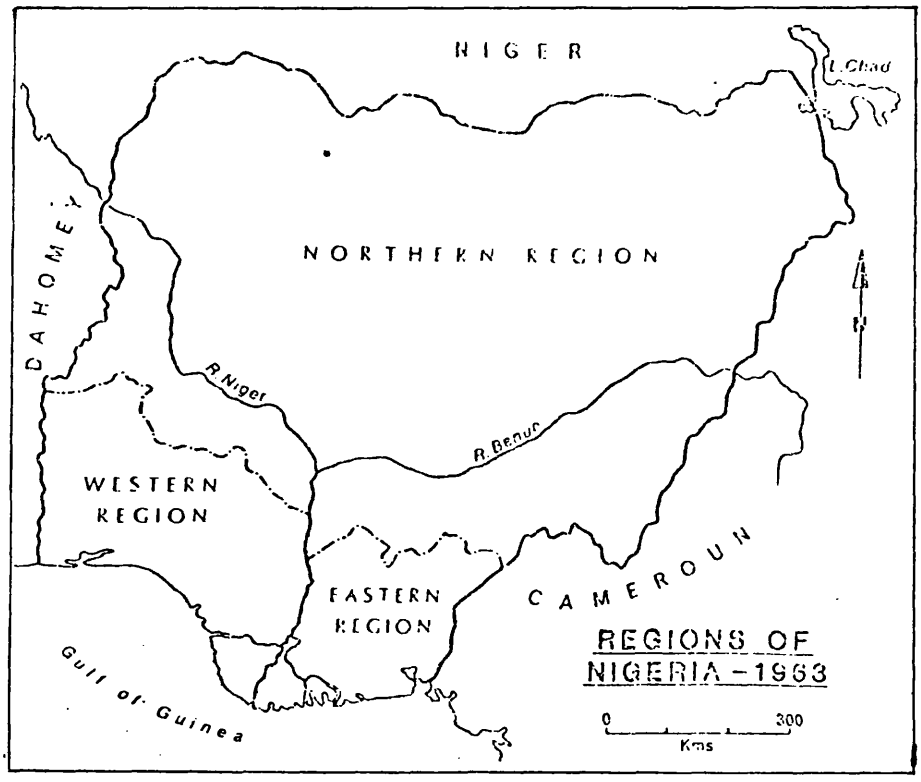
# APPENDIX I

## MAPS OF NIGERIA SHOWING ITS INTERNAL DIVISIONS AS AT 1963, 1967 AND 1976

A.

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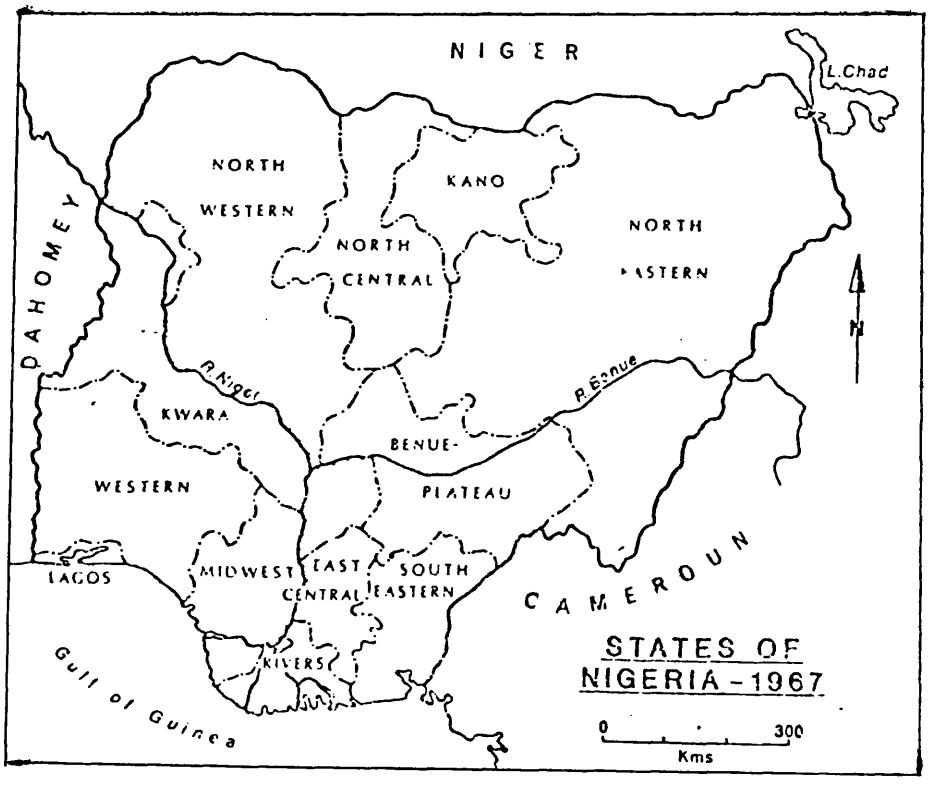

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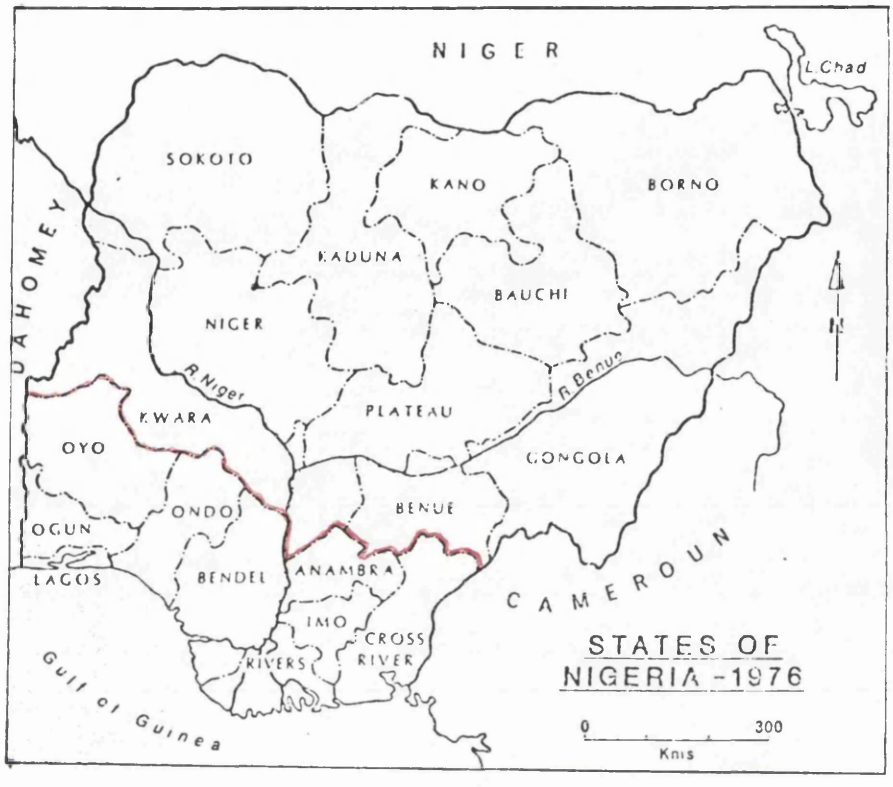


The map above reflects the present division of Nigeria into nineteen states.

The line drawn in red marks the division between the northern and southern states. It is thus readily apparent that the northern states comprise the bulk of both land-area and population.

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## APPENDIX II

## NEWSPAPER PRODUCTION AND CIRCULATION IN NIGERIA

Details of the production and circulation of some of the principal newspapers in Nigeria are reflected in the following table.

| *Publication* | *Town Published* | *Day of Publication* | *Printing Process* | *Total Circulation (in Nigeria)* |
|---|---|---|---|---|
| **DAILIES**<br>Daily Times | Lagos | Mon-Sat. | Letter-Press | 225,000 |
| New Nigerian | Kaduna/ Lagos | ,, | Litho | 80,000 |
| Nig. Observer | Benin | ,, | Litho | 80,000 |
| The Punch | Lagos | ,, | Litho | 120,000 |
| Daily Sketch | Ibadan | ,, | Litho | 150,000 |
| Daily Star | Enugu | ,, | Litho | 60,000 |
| Daily Express | Lagos | ,, | Litho | 30,000 |
| Nigerian Tribune | Ibadan | ,, | Litho | 60,000 |
| Evening Times | Lagos | ,, | Letter Press | 65,000 |
| W. A. Pilot | Lagos | ,, | ,, | 5,000 |
| Nigerian Standard | Jos | ,, | Litho | 22,000 |
| Nigerian Herald | Ilorin | ,, | Litho | 68,250 |
| Nigerian Chronicle | Calabar | ,, | Litho | 30,000 |
| Nigerian Tide | P. Harcourt | ,, | Litho | 40,000 |
| Sunday Express | Lagos | Sunday | Litho | 74,000 |
| Sunday Times | Lagos | Sunday | L. Press | 420,000 |
| Sunday Observer | Benin | ,, | Litho | 100,000 |
| Sunday Sketch | Ibadan | ,, | Litho | 140,000 |
| Sunday Star | Enugu | Sunday | Litho | 85,000 |
| Sunday Punch | Lagos | ,, | Litho | 150,000 |

(Continued from previous page):

| *Publication* | *Town Published* | *Day of Publication* | *Printing Process* | *Total Circulation (in Nigeria)* |
|---|---|---|---|---|
| Lagos Week End | Lagos | Friday | Letter Press | 235,000 |
| Times International | Lagos | Monday | ,, | 29,000 |
| Nigerian Business Guardian | Lagos | Thursday | Litho | 30,000 |
| Sporting Record | Lagos | Wednesday | Letter Press | 65,000 |
| Sporting Observer | Benin | Thursday | Litho | 40,000 |
| Sunday Standard | Benin | ,, | Litho | |
| WKL Pools Guide | Ibadan | ,, | Litho | 10,000 |
| Business Times | Lagos | Tuesday | Letter Press | 50,000 |
| Ogene | Enugu | Weekly | Litho | 30,000 |
| Gbohungboun | Ibadan | Wednesday | Litho | 55,000 |
| Imole Owuro | ,, | Saturday | Letter Press | 40,000 |
| Irohin Yoruba | ,, | Wednesday | Litho | 86,000 |
| Ilana Yoruba | ,, | Monday | Letter Press | 35,000 |
| Akede Yoruba | Lagos | Tuesday | ,, | 20,000 |
| Gaskiya Tafi Kwabo (Hausa) | Kaduna | ,, | Litho | 52,000 |
| WEEKLY GENERAL West Africa | Lagos | Weekly | Litho | 4,500 |
| Lagos This Week | Lagos | ,, | ,, | 10,000 |

*The Circulation figures as at 1977.

(The table above is derived from Dayo Duyile, Media and Mass Communications in Nigeria, Ibadan, 1979)

## APPENDIX III

## FULL TEXT OF CRIMINAL CODE[1]
## PROVISIONS ON DEFAMATION

### 'Chapter 33. Defamation

#### Definition of Defamatory Matter

373. Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.

Such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

It is immaterial whether at the time of the publication of the defamatory matter, the person concerning whom such matter is published is living or dead:

Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General of the Federation.

#### Definition of publication

374. For the purposes of this Code the publication of defamatory matter is -

(1) in the case of spoken words or audible sounds, the speaking of such words or the making of such sounds in the hearing of the person defamed or any other person;
(2) in other cases, the exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with intent that it may be read or seen by the person defamed or by any other person.

#### Publication of defamatory matter

375. Subject to the provisions of this chapter, any person who publishes any defamatory matter is guilty of a misdemeanour, and is liable to imprisonment for one year;

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1 Cap 42, (Laws of the Federation of Nigeria and Lagos, 1958)

and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years.

Publishing defamatory matter with intent to extort

376. Any person who publishes, or threatens to publish, or offers to abstain from publishing, or offers to prevent the publication of defamatory matter, with intent to extort money or other property, or with intent to induce any person to give, confer, procure, or attempt to procure, to, upon, or for, any person, any property or benefit of any kind, is guilty of a felony, and is liable to imprisonment for seven years.

The offender cannot be arrested without warrant.

Publication of truth for public benefit

377. The publication of defamatory matter is not an offence if the publication is, at the time it is made, for the public benefit, and if the defamatory matter is true.

Cases in which publication is absolutely privileged

378. The publication of defamatory matter is absolutely privileged, and no person is criminally liable in respect thereof, in the following cases: -

(1) if the matter is published by the President, Minister, or a Governor or by order of the President, Minister or a Governor in any official document, Gazette, or proceeding; or
(2) if the publication is made in a petition to the President, Minister, or a Governor; or
(3) if the publication takes place in any proceeding held before or under the authority of any court, or in any inquiry held under the authority of any Act, Law, Statute, or Order in Council, or under the authority of the President, Minister, or a Governor; or
(4) if the publication takes place in an official report made by a person appointed to hold an inquiry under the authority of any Act, Law, Statute, or Order in Council, or of the President, Minister, or a Governor; or
(5) if the matter is published concerning a person subject to military discipline for the time being, and relates to his conduct as a person subject to such discipline, and is published by some person having authority over him in respect of such conduct, and to some person having authority over him in respect of such conduct.

Cases in which publication is conditionally privileged

379. The publication of defamatory matter is conditionally privileged, and no person is criminally liable in respect thereof, in the following cases: -

(1) if the defamatory matter consists of an extract from, or an abstract of, a petition to, or a Gazette or document published by or under the authority of, the President, or a Governor of a State, or a Minister, and the publication is made without ill-will to the person defamed; or

(2) if the defamatory matter constitutes, in whole or in part, a fair report, for the information of the public, of any proceedings of any court, whether preliminary or final; or of any public proceeding of any body, constituted or authorised to hold such proceeding, by any Act, Law, Statute or Order; or of any public meeting so far as the public is concerned in the matter published; if in every such case the publication is made without ill-will to the person defamed; or

(3) if the publication is for the information of the public at the request of any Government department or peace officer, or if the defamatory matter is any notice or report issued by such department or officer for the information of the public, and if in every such case the publication is made without ill-will to the person defamed; or

(4) if the defamatory matter consists of fair comment either on any matter the publication of which, or on any report which, is hereinbefore in the preceding or this section referred to; or

(5) if the defamatory matter consists of fair comment upon the public conduct of any person in public affairs, or upon the public conduct of any person employed in the public service in the discharge of his public duties, or upon the character of any of such persons so far as it appears by such conduct; or

(6) if the defamatory matter consists of fair comment on any published book or other literary production, or any composition or work of art, or performance publicly exhibited, or any other communication made to the public on any subject; or on the character of the author of such book, production, composition, work of art, or the person exhibiting such performance, so far as their characters may appear therefrom respectively; or

(7) if the publication is in good faith for the purpose of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right to remedy or redress such wrong or grievance; or

(8) if the publication is made in good faith by a person having any lawful authority over another, and is made by him in the course of a censure passed by him on the conduct of that other, in matters to which such lawful authority relates; or

(9) if the publication is made on the invitation or challenge of the person defamed; or

(10) if the publication is made in order to answer or refute some other defamatory matter published by the person defamed, concerning the person making the publication or some other person; or

(11) if the defamatory matter constitutes an answer to inquiries made of the person publishing it, relating to some subject as to which the person by whom or on whose behalf the inquiry is made, has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, and if the publication is made in good faith for the purpose of giving information in respect of that matter to that person; or

(12) if the defamatory matter constitutes information given to the person to whom the defamatory matter is published, with respect to some subject as to which he has, or is on reasonable grounds believed to have, such an interest in knowing the truth, as to make the conduct of the person giving the information reasonable in the circumstances;

Provided that as regards paragraphs (7), (8), (9), (10) and (11), the person making the publication honestly believes the matter published to be true, the matter published is relevant to the matters the existence of which may excuse the publication of defamatory matter, and the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and as regards paragraph (12) that the defamatory matter is relevant to the subject therein mentioned, and that it is either true, or is made without ill-will to the person defamed and in the honest belief, on reasonable grounds, that it is true.

Publication in a periodical

380. (1) In this and the next succeeding section the term "periodical' includes any newspaper, review, magazine, or other writing or print, published periodically.

(2) The criminal responsibility of the proprietor, editor or publisher of any periodical for the publication of any defamatory matter contained therein, may be rebutted by proof that such publication took place without his knowledge and wihtout negligence on his part.

Protection of innocent sellers of books and newspapers

381. The sale by any person of any book, pamphlet or other printed or written matter, or of any number or part of any periodical, is not a publication thereof for the purposes of this chapter, unless such person knows that such book, pamphlet, printed or written matter, or number or part, contains defamatory matter; or, in the case of any part or number of any periodical, that such periodical habitually contains defamatory matter'.

## APPENDIX IV

## FULL TEXT OF PENAL CODE[1] PROVISIONS ON DEFAMATION

### 'Chapter XXIII

Defamation defined

391. (1) Whoever by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, save in the cases hereinafter excepted, to defame that person.

Explanation 1. It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2. It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3. An imputation in the form of an alternative or expressed ironically may amount to defamation.

Explanation 4. No imputation is said to harm a person's reputation, unless that imputation directly or indirectly in the estimation of others lowers the moral or intellectual character of that person or lowers the character of that person in respect of his calling or lowers the credit of that person or causes it to be believed that the body of that person is in a loathsome state or in a state generally considered as disgraceful.

Illustrations. (a) A says - "Z is an honest man, he never stole B's watch", intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation unless it falls within one of the exceptions.

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1. Cap 89, (Laws of Northern Nigeria, 1963)

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

Exceptions

(2) It is not defamation -

Imputations of truth which public good requires to be published

(i) to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published: whether or not it is for the public good is a question of fact;

Illustrations. (a) Z opens a school at Kaduna. The fact is that Z has fled from Europe to escape punishment for gross acts of swindling. A is protected by this exception if he publishes that fact.

(b) But if the swindling had occurred twenty years ago and in the meantime Z had been carrying on a school in Zaria and had been living an upright life, A would not be protected by this exception if he raked up the facts and published them.

Public conduct of public servant

(ii) to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct and no further;

Conduct of any person touching any public question

(iii) to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character so far as his character appears in that conduct and no further;

Illustration. It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such a meeting or in forming or joining any society which invites the public support.

Publication of reports of proceedings of courts

(iv) to publish a substantially true report of the proceedings of a court of justice or of the result of any such proceedings;

Merits of case decided in court or conduct of witnesses and others concerned

(v) to express in good faith any opinion whatever respecting the merits of any case civil or criminal which has been decided by a court of justice or respecting the conduct of any person as a party, witness or agent in any such case or respecting the character of such person as far as his character appears in that conduct and no further;

Illustrations. (a) A says - "I think Z's evidence is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness and no further.

(b) But if A says - "I do not believe what Z asserted at the trial, because I know him to be a man without veracity", A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness.

Merits of public performance

(vi) to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public or respecting the character of the author so far as his character appears in such performance and no further;

Explanation. A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations. (a) A person who publishes a book submits that book to the judgment of the public.

(b) A person who makes a speech in public submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z - "Z's book is foolish, Z must be a weak man. Z's book is indecent, Z must be a man of impure mind", A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book and no further.

(e) But if A says - "I am not surprised that Z's book is foolish and indecent for he is a weak man and a libertine", A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Censure passed in good faith by person having lawful authority over another

(vii) in a person having over another any authority either conferred by law or arising out of a lawful contract made with that other to pass in good faith any censure on the conduct of that other in matters to which lawful authority relates;

Illustration. An alkali censuring in good faith the conduct of a witness or of an officer of the court; a head of department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for inefficiency in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier - are within this exception.

Accusation preferred in good faith to authorised person

(viii) to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of the accusation;

Illustration. If A in good faith accuses Z before a magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father - A is within this exception.

Imputation made in good faith by person for protection of his or other's interests

(ix) to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it or of any other person or for the public good;

Illustrations. (a) A, shopkeeper, says to B, who manages his business - "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a District Officer, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

(c) A, in giving evidence before a court of justice, identifies Z as the person he saw committing a robbery. Although Z proves that A is mistaken, A is protected by this exception. If he is giving false evidence, he can be proceeded against under section 518.

Caution intended for good of person to whom conveyed or for public good

(x) to convey a caution in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed or of some person in whom that person is interested or for the public good.

Punishment for defamation

392. Whoever defames another shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Injurious falsehood

393. (1) Whoever, save as hereinafter excepted, by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any false statement of fact, intending to harm or knowing or having reason to believe that such false statement of fact will harm the reputation of any person or class

of persons or of the Government or of any native authority in Northern Nigeria or of any local government authority in Northern Nigeria shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Explanation 1. A statement is false unless it is substantially true and proof that a statement is substantially true shall lie on the accused.

Explanation 2. Whether a statement is a statement of fact or a mere expression of opinion is a matter for the decision of the court.

(2) It is not an offence under this section to make or publish in good faith a false statement of fact which the accused had reasonable grounds for believing to be substantially true and proof that he had such reasonable grounds shall lie on the accused.

Illustrations. (a) A newspaper publishes a false statement that the proceeds of a recent increase in a tax were shared amongst the Ministers of the state personally. This is a false statement of fact.

(b) A says that Z's bakery is unhygienic. This is a statement of opinion; but if A says that he saw Z take a dead mouse out of the dough before baking this is a statement of fact.

Printing or engraving matter known to be defamatory

394. Whoever prints or engraves any matter or prepares or causes to be prepared any record for the purpose of mechanical reproduction of any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Sale of printed or engraved substance containing defamatory matter

395. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter or any record prepared for the purpose of the mechanical reproduction of defamatory matter, knowing that such substance or record contains such matter, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

# ABBREVIATIONS

## I. Nigerian

| | |
|---|---|
| All N.L.R. | All Nigeria Law Reports |
| Cap. | Chapter |
| C.C.H.C.J. | Certified copies of High Court Judgments |
| E.C.S.L.R. | Law Reports of East-Central State of Nigeria |
| E.N.L.R. | Law Reports of Eastern Nigeria |
| E.R.L.R. | Law Reports of the Eastern Region of Nigeria |
| E.R.N.L.R. | Eastern Region of Nigeria Law Reports |
| F.N.L.R. | Federal Law Reports |
| F.S.C. | Selected Judgments of the Federal Supreme Court |
| L.L.R. | Law Reports of the High Court of the Federal Territory of Lagos (1956-1966); Law Reports of the High Court of Lagos State (1967-date) |
| L.N. | Legal Notice |
| L.R.N. | Law Reports of Nigeria |
| N.C.R. | Nigerian Criminal Reports |
| N.C.L.R. | Nigerian Constitutional Law Reports |
| N.L.R. | Nigeria Law Reports |
| N.M.L.R. | Nigerian Monthly Law Reports |
| N.R.N.L.R. | Law Reports of the Northern Region of the Federation of Nigeria |
| S.C. | Reserved Judgments of the Supreme Court of Nigeria |
| U.I.L.R. | University of Ife (Nigeria) Law Reports |
| W.A.C.A. | Selected Judgments of the West African Court of Appeal (1930-1956) |
| W.N.L.R. | Western Nigeria Law Reports |

## II. United Kingdom

| | |
|---|---|
| A.C. | Appeal Cases |
| All E.R. | All England Law Reports |
| App. Cas. | Appeal Cases |
| Atk. | Atkyns' Chancery Reports |
| B. & Ald. | Barnewell and Alderson's King's Bench Reports |

| | |
|---|---|
| Beav. | Beavan |
| Bing. | Bingham's Common Pleas Reports |
| Bos. & P. | Bosanquet and Puller's Common Pleas Reports |
| C.A. | Court of Appeal |
| Camp. | Campbell's Nisi Prius Reports |
| Ch. | Chancery Law Reports |
| Ch. D. | Law Reports, Chancery Division |
| Co. Rep. | Coke's King's Bench Reports |
| Cox C.C. | Cos's Criminal Cases |
| C.P.D. | Law Reports, Common Pleas Division |
| D.C. | Divisional Court |
| E. & B. | Ellis and Blackburn's Queen's Bench Reports |
| E.B. & E. | Ellis, Blackburn and Ellis English Queen's Bench Reports |
| E. & E. | Ellis and Ellis |
| E.R. | English Reports |
| Fam. | Family (Division Reports) |
| H.L.C. | Clark's House of Lords' Cases |
| H.L.(E.)) | House of Lords (England) |
| H. & Tw. | Hall and Twell's Chancery Reports |
| K.B. | Law Reports King's Bench |
| L.J. Ch. | Law Journal Reports, Chancery, New Series |
| L.J.Q.B. | Law Journal Reports, New Series, Queen's Bench |
| L.R. P.C. | Law Reports Privy Council |
| L.T. | Law Times Reports |
| L.T. Jo. | Law Times |
| M & W. | Meeson and Welsby's Exchequer Reports |
| My. & Cr. | Mylne and Craig's Chancery Reports |
| N.I. | Northern Ireland Reports |
| N.I.L.R. | Northern Ireland Law Reports |
| Q.B. | Law Reports Queen's Bench |
| Q.B.D. | Queen's Bench Division Reports |
| S.L.T. | Scots Law Times, 1893-<br>Scots Law Times Reports, 1950- |
| Sol. Jo. | Solicitors' Journal (and Reporter) |
| Stra. | Strange's King's Bench Reports |
| St. Tr. | Howell's State Trials |
| T.L.R. | Times Law Reports |
| T.R. | Durnford and East's Term Reports |
| Ves. | Vesey Junior's Chancery Reports (1789-1817)<br>Vesey Senior's English Chancery Reports (1747-1756) |
| Wilm. | Wilmot's Notes and Opinions King's Bench |
| W.L.R. | Weekly Law Reports |

## III Commonwealth and Miscellaneous Other

### 1. Australian

| | |
|---|---|
| C.L.R. | Commonwealth Law Reports |
| L.R. (N.S.W.) | Law Reports, New South Wales |
| N.S.W.L.R. | New South Wales Law Reports |
| N.S.W. Sup. Ct. | New South Wales Supreme Court |
| S.R. (N.S.W.) | New South Wales State Reports |
| V.L.R. | Victorian Law Reports |
| W.A.R. | Western Australian Reports |

### 2. Canadian

| | |
|---|---|
| C.A. | Court of Appeals |
| C.C.C. | Canadian Criminal Cases |
| D.L.R. | Dominion Law Reports |
| N.B.R. | New Brunswick Reports |
| S.C. | Quebec Official Reports, Superior Court |
| S.C.R. | Canada Law Reports (Supreme Court) |

### 3. Indian

| | |
|---|---|
| A.I.R. | All India Reporter |
| All. | Allahabad |
| Cal. | Calcutta |
| E.P. | East Punjab |
| Lah. | Lahore |
| Mad. | Madras |
| Oudh | Oudh |
| P.C. | Privy Council |
| Ran. | Rangoon |
| S.C. | Supreme Court |
| Sind | Sind |
| I.L.R. | Indian Law Reports |
| All. | Allahabad |
| Bom. | Bombay |
| Cal. | Calcutta |
| L.B.R. | Lower Burma Rulings |
| M.W.N. | Madras Weekly Notes |
| P.L.R. | Punjab Law Reporter |
| S.C.J. | Supreme Court Judgments |
| S.C.R. | Supreme Court Reports |
| Weir. | Weir's Reports |
| L.R. I.A.* | Law Reports, Indian Appeal |

*United Kingdom report relating to India

4. New Zealand

| | |
|---|---|
| N.Z.L.R. | New Zealand Law Reports |

5. Miscellaneous Other

| | |
|---|---|
| E.H.R.R. | European Human Rights Reports |
| I.R. | Irish Reports |
| Ir. L.T. | Irish Law Times Reports |
| S.A. (T) | South African Law Reports, Transvaal Provincial Division |
| S.L.J.R. | Sudan Law Journal Reports |
| W.I.A.S. | Court of Appeal of the West Indies Associated States |
| W.I.R. | West Indian Reports |
| Z.L.R. | Zambian Law Reports |

III. United States of America

| | |
|---|---|
| A. 2d | Atlantic Reporter, Second Series |
| A.L.R. | American Law Reports |
| Ariz. | Arizona; Arizona Supreme Court Reports |
| Cal. App. | California Appellate Reports |
| Cal. Rptr. | California Reporter |
| Cranch. | Cranch, United States Supreme Court Reports; United States Circuit Court Reports |
| D.C. Cir. | United States Court of Appeals for the District of Columbia Circuit |
| F. 2d | Federal Reporter, Second Series |
| F.C.C. 2d | Federal Communications Commission Reports, Second Series |
| F. Supp. | Federal Supplement |
| Fla. | Florida; Florida Supreme Court Reports |
| Ill. | Illinois; Illinois Supreme Court Reports |
| Ind. | Indiana; Indiana Supreme Court Reports |
| Ky. | Kentucky; Kentucky Court of Appeals Reports |
| La. App. | Louisiana Courts of Appeal Reports |
| Mass. | Massachusetts; Massachusetts Supreme Judicial Court Reports |
| N.D. Cal. | United States District Court for the Northern District of California |

| | |
|---|---|
| N.E. 2d | Northeastern Reporter, Second Series |
| N.J. | New Jersey; New Jersey Court of Errors and Appeals Reports |
| N.W. 2d | Northwestern Reporter, Second Series |
| Or. | Oregon; Oregon Supreme Court Reports |
| P. 2d | Pacific Reporter, Second Series |
| S.D.N.Y. | United States District Court for the Southern District of New York |
| S.W. 2d | Southwestern Reporter, Second Series |
| So. 2d | Southern Reporter, Second Series |
| S. Ct. | Supreme Court Reporter |
| Tex. Civ. App. | Texas Civil Appeal Reports |
| U.S. | United States Supreme Court Reports |
| U.S. App. D.C. | United States Court of Appeals Reports |
| Wash. App. | Washington Appellate Reports |
| Wash. 2d | Washington; Washington Supreme Court Reports, Second Series |
| Wheat. | Wheaton (U.S.) |
| Wis. 2d | Wisconsin; Wisconsin Supreme Court Reports, Second Series |

# TABLE OF CASES

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* Certain non-Commonwealth cases are included in category 5, below.

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# TABLE OF STATUTES

# AND SUBSIDIARY LEGISLATION

## A. Legislation of Nigeria

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*Chapter numbers are those of the 1958 edition of the Laws of the Federation of Nigeria and Lagos

Enactments of the former Federal Military Government which no longer apply in Nigeria are referred to as Decrees, and those which have continued application as Acts

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2. State Legislation

(a) Eastern Nigeria (comprising Anambra, Cross River, Imo and Rivers States)

*Chapter numbers are those of the 1963 edition of the Laws of Eastern Nigeria

(b) Northern Nigeria (now comprising Bauchi, Benue, Gongola, Kaduna, Kano, Kwara, Niger, Plateau and Sokota States)

*Chapter numbers are those of the 1963 edition of the Laws of Northern Nigeria

ii. Subsidiary legislation



(c) Western Nigeria (now comprising Bendel, Ogun, Ondo and Oyo States)

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ii. Subsidiary legislation

(d) Lagos State

*Chapter numbers are those of the 1973 edition of the Laws of Lagos State

## B. Legislation of the United Kingdom

Subsidiary legislation

## C. Legislation of Other Commonwealth States



## D. Legislation of Miscellaneous Other States

## E. Legislation of the United States of America

### 1. Federal Legislation



### 2. State Legislation

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*These are listed in date order

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# CHAPTER ONE

## THE VALUE AND MEANING OF MEDIA FREEDOM

### 1.1 The Significance of Freedom of the Media

The fundamental rights of the individual are essentially inter-dependent and mutually reinforcing; and any attempt to rank them in a hierarchy of importance must always be arbitrary. It is nevertheless apparent, in the words of Sir Zelman Cowen, that '[o]ne of the great historic claims to liberty in democratic societies, and one given a special emphasis in contemporary debate, is the claim to speak, to publish, to know and make known: the claim to freedom of speech and of the press and the media'[1]. The importance of media freedom has also been strongly emphasised by Lord Simon of Glaisdale, in the House of Lords, in the controversial 'thalidomide' case[2]. He points out that '[p]eople cannot adequately influence the decisions which affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions'[3]; and stresses that '[m]uch of such fact-finding and argumentation has to be conducted vicariously, the public press being a principal instrument'[4] in this regard.

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1 Sir Zelman Cowen, Cowen's Individual Liberty and the Law, Tagore Law Lectures, Calcutta, 1977, p 5.

2 Attorney-General v Times Newspapers Ltd., [1973] 3 All E.R. 54 (H.L.(E.)). This important decision is further discussed in Chapter Nine.

3 Ibid, at 77.

4 Ibid.

The importance of the media stems thus - in large measure - from the unique means they have at their disposal to 'gather, process and disseminate ... [important] information to large, heterogenous and wide-dispersed audiences'[1]. The ordinary individual in modern society, by contrast, has few such resources; and must accordingly rely to a very considerable extent upon the media to provide the knowledge necessary for informed decision-making.

The media's unique capacity for the collection and dissemination of information also gives it a much-needed means - through investigative journalism - of guarding against abuse of power at all levels of society. The importance of investigative journalism has been graphically demonstrated by the Watergate scandal, in which revelations of abuse of public office - brought to the attention of the world by the Washington Post - led ultimately to the resignation of President Nixon. Less dramatically - but no less significantly - the media have, in addition, been able to draw attention not only to other abuses in the political and economic corridors of power, but also - at a lower but equally important level - to other sharp practices and fraud, against which the ordinary individual generally has little protection.

A further vital concomitant of the media's unique information resources lies in the educative role the media are capable of fulfilling. Education has immense importance

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[1] The Nigerian Sunday Observer, 23 January, 1977.

in any society: but is particularly crucial in many Third World states still grappling with the problems of under-development; and with the need to assimilate the changes that have rocked their societies and to forge effective political and social institutions to promote the well-being of their peoples and meet the difficulties posed by the modern world. The media are capable of playing a vital role in this process. They can articulate the benefits and disadvantages of different development strategies; help to relieve the pressures on strained formal educational facilities; spread skills and knowledge throughout society; warn of the dangers of over-population and the need to conserve resources; and stress the common humanity which unerlies ethnic and cultural differences.

The media have other important roles as well: in providing entertainment, promoting the arts, fostering interest and participation in sports - to name but a few further examples. Analysis of these functions lies outside the scope of this study, however, and - for present purposes - the most important functions of the media may be summarised as being to inform, to investigate, to expose abuse and to educate. All these functions are of crucial significance to society: but - it is submitted - can only be fulfilled by media that are "free" from "unnecessary restraint"[1]. The meaning of these terms thus calls for some examination.

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[1] It is axiomatic that freedom of expression cannot be absolute: that it must be subject to certain restraint in order to safeguard other legitimate and competing interests within society. The difficulty lies in drawing the line between appropriate and excessive restraint: and this conundrum will be further examined throughout this study.

## 1.2 The Meaning of Media Freedom

The philosophical dilemma surrounding the question of what constitutes "unnecessary restraint" upon the media is further examined below, but - before proceeding to this analysis - it is important to attempt some definition of media freedom. This is by no means easy: for media freedom has been given a wide and confusing diversity of interpretations.

This is particularly evident in a study conducted by the Indian Press Commission, which indicated that :

> '(1) some people understood freedom of the press to mean freedom from legal restraint - liberty, that is to say, to publish any matter without legal restraint or prohibition; (2) some understood it to mean freedom from prejudicies and preconceived notions; (3) some thought it meant freedom from the executive control of government; (4) some thought it consisted in freedom from the influence of advertisers, or proprietors and pressure groups; and, finally, (5) some thought it consisted in freedom from want - freedom from dependence on others for financial assistance'[1].

All these factors are important facets of media freedom; and all five should no doubt be satisfied before media freedom can be said to have real significance. It may be, however, that all five cannot be achieved in practice: and it has been warned that 'attempts to secure freedom from bias, from proprietors, advertisers and pressure groups, and from want ((2), (4) and (5) above) may ... lead to

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[1] See Denys C. Holland, 'Freedom of the Press in the Commonwealth', (1956) 9 Current Legal Problems, pp 184 - 207, p 184.

attempts to impose undue legal restraints and executive control ((1) and (3)) as a remedy'[1].

If a choice must thus be made between the first and second categories of freedoms, then - it is submitted - the former should be preferred. Bias and economic pressure are likely to continue in any event; and it is far preferable that a choice of publications and broadcasts motivated by such factors should be available than that society should be left with the rigid uniformity and "thought control" imposed by excessive legal constraint and executive domination.

Freedom of the media may therefore be defined (in terms derived in part from the European Convention on Human Rights of 1950 and now reiterated in the national constitutions of many states[2]) as the right enjoyed by the press (through

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1 See ibid, p 185. Holland submits that this 'is well-illustrated by the Report of the Royal Commission on the Press in the U.K, /Cmnd. 7700, 1949/ /which/... was set up to inquire into the control, management and ownership of newspapers /following/... allegations... that freedom of the press was being endangered by monopoly control and the influence of advertisers being used to suppress opinion and distort facts'. The Report found the complaints totally unjustified; and concluded that no prohibition should be placed on private ownership of newspapers, as had been demanded. The Commission clearly believed that a choice of bias (accepting that this does indeed result from private ownership, of which the Commission was not convinced) is preferable to government monopoly and control.

2 The process by which this has occurred is explained further in this study at p 173 below. It is interesting to note that Nigeria has played a vital role in this development, as she was virtually the first Commonwealth country to adopt a detailed Bill of Rights. This was modelled on the European Convention and has served, in turn, to provide a basis for similar Bills of Rights introduced thereafter in most of the new Commonwealth states.

both print and electronic media) to 'receive and impart ideas and information without interference'. The concept 'without interference' connotes, ideally, the fulfillment of all five aspects of media freedom described above; but refers principally to the absence of undue legislative constraint or executive control. This raises in acute from the question of what is "undue" legislative and executive restraint; and the answer is by no means easy to find: for the value of freedom of expression and the extent to which it may be curtailed to promote other interests of society, such as public order and state security, the due administration of justice, and the rights of individuals to reputation and privacy raise some of the most complex issues in the modern world.[1]

## 1.3. The Value of Freedom of Expression

Freedom of expression has been both extolled and denigrated in different times and contexts: and the object of this section is to trace in brief outline the benefits and disadvantages which have been said to pertain to it.

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[1] As Sir Zelman Cowen has warned, the modern world is one of 'rising prices, falling incomes, a new distribution of power and impotence, threats of war and starvation, crime and disorder, and declining confidence in the capacity of those who govern or even the institutions of government': See Cowen's Individual Liberty, op cit, p 2. The old certainties are vanishing; and the decline of confidence in established political institutions in particular throws the proper relationship between competing interests (especially those of state and citizen) into a spotlight of attention which serves mainly to highlight its complexity and uncertainty.

## 1.3.1. The Benefits of Freedom of Expression

The arguments in favour of freedom of expression include the following:

(i) The accepted wisdom in any society is never complete and may well be false; and truth is only ascertained through the unrestricted clash of ideas.

This broad head incorporates a number of different elements which have been variously expressed by different writers. It is supported by Milton in his celebrated Areopagitica[1] in which he eloquently pleads for the abolition of licensing restrictions on the printing of books, pointing out that 'all the invention, the art, the wit, the grave and solid judgment which is in England... can/not/ be comprehended in any twenty capacities[2] how good soever'[3]. His confidence in the capacity of truth to triumph overall is unbounded; and is expressed in the following ringing terms:

> '/T/hough all the winds of doctrine were let loose to play upon the Earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'[4]

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1 A Speech for the Liberty of Unlicensed Printing, To the Parliament of England (1644), reproduced in Dorsen, Bender and Neuborne, Political and Civil Rights in the United States, 4th ed., 1976, Vol. 1, p 1.

2 In other words, the minds of the licensors.

3 Milton, supra.

4 Ibid, p 3.

Mill, writing On Liberty in 1859, emphasises the lacunae in society's conventional wisdoms. He submits that 'until mankind shall have entered a stage of /far higher/ intellectual advancement'[1], it is a fallacy to assume that society's "truth" represents the whole. Far more likely is that the conflicting doctrines (the conventional and the "heretical") 'share the truth between them: /so that/ the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part'.[2] For those in authority to suppress such nonconforming opinion implies an assumption, on their part, of infallibility:[3] that they know, with absolute certainty, what is true and what false. To Mill, this is unacceptable - both because the conventional wisdom cannot be complete (at this point in intellectual advancement) and because the assumption undermines the individual's own capacity to form a view on what is right or wrong (as further explained below)[4].

A similar viewpoint has been expounded by Mr. Justice Brandeis

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1 Mill, On Liberty, 1859, reproduced by Dorsen, Bender and Neuborne, op cit, p 6.

2 Mill, in Dorsen, Bender and Neuborne, op cit, p 6.

3 See ibid, p 5. Mill's statement in this regard, that 'All silencing of discussion is an assumption of infallibility' has been criticised for factual inaccuracy. See G. Marshall, Constitutional Theory, Oxford, 1971, pp 157-159 who points out that the suppressors may be motivated by self-interest rather than belief in the truth of their assertions. Mill's attempts to counter this criticism are discussed by C.L. Ten, Mill On Liberty, Oxford, 1980, pp 131-132.

4 See p 11 below. In addition, he believed that no opinion can be rationally held unless its foundation has been fully explored. See p 12 below, and Ten, ibid, p 126.

in the United States' Supreme Court in Whitney v California[1].

In his graphic terms:

'Those who won our independence... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government'[2].

It is submitted that these declarations are all the more relevant and compelling in the hazardous conditions of the modern world. Freedom of expression is essential to enable informed evaluation of the risks and benefits of new technologies;[3] is crucial to the proper assessment of issues that threaten the existence of life itself;[4] and is vital to the effective challenge of prevailing ideologies[5] which threaten to lock the world into irreconcilable conflict and competition.

Furthermore, once it is accepted that certain ideas and information may legitimately be suppressed, this raises a difficulty of enormous proportions. Who, in society, is to be entrusted with that decision? And who is to guard the guardians of information thus established? An elected legislature, by definition, reflects majority views and is not

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1 274 U.S. 357 (1927).

2 Ibid, at 375.

3 Obvious examples of such new technology are provided both by the growth of the nuclear power industry: and by burgeoning computerisation in the developed world.

4 Examples of such issues include the nuclear arms race and increasing threats of environmental destruction through, inter alia, industrial pollution and massive deforestation.

5 These include not only capitalism and communism but also the contrasting viewpoints of developed and developing countries in the North:South debate.

likely to be sympathetic to the opinions of the minority (which may, nevertheless, hold a kernel of truth). An independent judiciary, even if steeped in a liberal tradition, nevertheless constitutes a small elite, with its own prejudices and predilections and with the same human susceptibility to national hysteria as others - as the conviction of Communist party leaders in the United States in the early 1950s arguably demonstrates.[1]

Moreover, the assertion that certain information may be entrusted to "the people", whilst other views may not, is fundamentally paternalistic - as emphasised by Milton in Areopagitica. To quote his memorable words:

> 'Nor is it /the licensing system/ to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people; in such a sick and weak state of faith and discretions, as to be able to take nothing down but through the pipe of a licensor? That this is care or love of them we cannot pretend...'[2]

(ii) Freedom of expression is essential to the development of man as a rational being; and as a being capable of self-government and social interaction.

Echoing Milton's suspicion of paternalism and his own doubts as to the assumption of infallibility implicit in the suppression of certain information, Mill emphasises that

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[1] See Dennis v United States, 341 U.S. 494 (1951) discussed in further detail below.

[2] Milton, Areopagitica, in Dorsen, Bender and Neuborne op cit, p 2.

those in power 'have no authority to decide /a/ question for all mankind, and exclude every other person from the means of judging'[1]. This notion is particularly inimical to Mill who believes that one of the greatest advantages of freedom of discussion lies 'in what it can do for the average human being'[2]. He thus declares:

> 'Not that it is solely, or chiefly, to form great thinkers, that freedom of thinking is required. On the contrary, it is as much and even more to enable average human beings to attain the mental stature which they are capable of. There have been, and may again, be, great individual thinkers in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere an intellectually active people'[3].

The faculties of intellect, of weighing conflicting views, of discernment and judgment must be exercised if they are not to atrophy.[4] Accordingly, there is no benefit to the individual in imbibing the conventional wisdom of society as 'dead dogma'[5]. Furthermore, unless the individual has come to accept a particular view through his own intellectual assessment of its merits, he will neither 'appreciate to any considerable degree what he is committed to /in/ accept/ing/ /it/'[6], nor be able to discern the value of

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1 Mill, On Liberty, in Dorsen, Bender and Neuborne, op cit, p 5.

2 Ten, op cit, p 130.

3 Mill, On Liberty, p 94, (cited by Ten, ibid, pp 130-131), emphasis supplied.

4 See Ten, ibid, p 127. The same view is also expressed by Milton in Areopagitica, in which he asserts: 'Well knows he who uses to consider, that our faith and knowledge thrives by exercise, as well as our limbs and complexion'. See Milton, op cit, in Dorsen, Bender and Neuborne.

5 Mill, On Liberty, in Dorsen, Bender and Neuborne, ibid, p 5. Mill states: '/I/f it /an opinion/ is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth'.

6 Ten, supra, p 126.

any alternative opinion: and will be unnecessarily suspicious of new concepts. Thus, in Mill's view, it is the process of reaching particular opinions - for which uninhibited discussion is essential - that is important; and the fact that an opinion, received and held as 'dead dogma', may be true, is largely irrelevant. In Mill's graphic phrase:

> 'Assuming that /a/ true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument - this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth'.[1]

Thus, '/f/or Mill, it really is important not only what beliefs men hold, but also what manner of men they are that hold them'[2]; and the highest goal for man - as a rational and social being - lies in developing the capacity to 'giv/e/ merited honour to every one, whatever opinion he may hold, /and to have the/... calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favour'.[3]

A similar belief in the importance of freedom of expression to the development of the individual has been expressed by others on a number of occasions. Thus, for example, Mr.

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1 Mill, supra, in Dorsen, Bender and Neuborne, supra.

2 Ten, supra, p 127.

3 Mill, On Liberty, in Dorsen, Bender, and Neuborne, supra p 7.

Justice Brandeis has asserted[1] that, 'Those who won /the United States'/ independence believed that the final end of the State was to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary'.[2]

Professor Haiman[3] points out social order is not an end in itself but simply a 'means to maximising individual liberty and security': to which goal the 'self-expression and self-fulfillment of the individuals who compose a society'[4] is crucial. He believes that individuals 'are capable of free choice and are responsible for the behaviour which they choose'[5]; and that the suppression of information precludes the autonomous decision-making of which man is capable and therefore 'violates /his/ integrity'[6]. He acknowledges that 'some individuals may be more intelligent, more mature or better educated than others'[7], but stresses that 'every informed person is ultimately the best judge of his or her own interests'.[8]

The renowned jurist, Meiklejohn, emphasises the further factor that free expression is essential not only to individual choice and the development of man's rational faculties

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1 In Whitney v California, 274 U.S. 357 (1927).

2 Ibid, at 375, emphasis supplied.

3 Franklyn S. Haiman, Speech and Law in a Free Society, Chicago and London, 1981.

4 Ibid, p 6.

5 Ibid, p 7.

6 Ibid.

7 Ibid.

8 Ibid.

but is also crucial to effective self-government: the proclaimed ideal of democracy. He thus declares:

'When men govern themselves, it is they - and no one else - who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe... Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.[1] The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic... agreement that public issues shall be decided by universal suffrage'.[2]

A further relevant consideration is the need for the development and maintenance of trust amongst the individual members of society. Man, as a social being, requires interaction with other individuals in an atmosphere of mutual trust and confidence; and freedom of expression has a vital role to play in this regard . Without it, a community is likely to be characterised by the mistrust and suspicion so often born of ignorance and incomprehension.[3] In addition, the implementation of restrictions requires its own apparatus of repression, whether by way of 'surveillance, searches and seizures /or/ secret informers'[4] -

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1 The content of the First Amendment is discussed further at p 39 below.

2 A. Meiklejohn, Political Freedom, 1960, pp 26-28, (reproduced in Dorsen, Bender and Neuborne, op cit) p 9.

3 See T.I. Emerson, The System of Freedom of Expression, 1970 (reproduced in Dorsen, Bender and Neuborne, ibid, p 13).

4 Ibid.

and these are not only fearful in themselves, but are also disturbingly open 'to distortion and to use for ulterior purposes'.[1]

(iii) Freedom of expression is an essential check on the abuse of power. The free flow of information is essential not only to prevent abuse of the kind mooted above, but all other excesses of authority as well. As the complexities of modern society have increased, so too have the opportunities for abuse; and so long as there remains some kernel of truth in the aphorism that 'all power corrupts, and absolute power corrupts absolutely' freedom of expression will continue to constitute a vital check against this. The lesson of Watergate is clear.[2] Freedom of expression must thus be regarded as one of the most crucial of human rights: for 'the preservation of our liberties, the scrutiny of our laws and the maintenance of justice all demand constant vigilance'[3] - and only the free flow of information can enable this.

(iv) Freedom of expression provides a safety-valve for the release of destructive emotion.

Discontent cannot be removed by restricting its expression. On the contrary, such repression 'will only serve to sharpen the sense of injustice and provide added arguments and

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1 Ibid.

2 See p 2 above.

3 Sir Norman Anderson, Liberty, Law and Justice, The Hamlyn Lectures, Thirtieth Series, London, 1978, p 104.

rationalizations for desperate, perhaps reckless, measures'.[1] Suppression can only confer a false sense of temporary security; whereas 'freedom of utterance, even though it be rebellious, constitutes a safety valve that gives timely warning of dangerous pressures in our society'[2]. The admonition of Mr. Justice Brandeis in this regard, in Whitney v California[3], is again salutary:

> '/O/rder cannot be secured merely through fear of punishment for its infraction... repression breeds hate; /and/ hate menaces stable government'.[4]

It must always be remembered that where discontent and its repression are equally strong, violence may seem to offer the only solution to the impasse; and that it is a fundamental requirement for the maintenance of democracy that channels be kept open for the replacement - by peaceful means - of a government no longer capable of commanding popular support.[5]

(v) Expression is 'self-regarding' conduct and its regulation lies outside the province of law.

It is part of Mill's general theory that 'society is not entitled to suppress acts which can be considered self-regarding in that they do no assignable harm to others'.[6]

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1 Henry J. Abraham, Freedom and the Court, 4th ed., New York, 1982, p 219.
2 Ibid.
3 274 U.S. 357 (1927).
4 Ibid, at 375.
5 The military coups d'etats which have been so prevalent in many parts of the world in the past few decades graphically demonstrate the dangers of power becoming so firmly concentrated in the hands of a small elite that there seems no effective way of breaking this control, save by toppling the entire political structure and establishing a new military government in its wake.
6 Ten, op cit, p 155; Marshall, op cit, p 155. 'Collected Works of John Stuart Mill, Vol III, Toronto and London 1965, p 947.

Hence, freedom of expression - which gives to 'persons of ordinary intellect /the opportunity/ to strive to know the truth and thereby to attain the 'dignity of thinking beings'[1] - falls outside the proper ambit of suppression - at least in so far as it causes no harm to others.[2] Essentially the same view is expressed by Emerson[3] who submits that (notwithstanding the difficulties this may involve) a line should be drawn between expression and action, with freedom of expression being entitled to absolute protection.[4]

The above are some of the main arguments advanced in support of freedom of expression. It now remains to consider the countervailing views.

1.3.2. The Disadvantages of Free Expression

(i) The conventional wisdom may be true; and it may be misconceived to expect truth to emerge through the clash of ideas.

It may be argued that - if the accepted view of society is true-then the failure to suppress any conflicting opinion

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1 Ten, op cit, p 136, citing 'Collected Works of John Stuart Mill, Vol. III, Toronto and London, 1965, p 947.

2 Mill gives brief consideration to this problem, indicating for example, that incitement to tyrannicide may be punished if the causal connection between expression and conduct can be shown. This conundrum is discussed further at p 21 below.

3 Op cit, supra, p 19, (reproduced by Dorsen, Bender and Neuborne, op cit, p 59 n c).

4 Ibid.

is a weakness and a foolish risk. It is submitted, however, that this contention falls at the first hurdle. In the current state of human development, there can be no absolute certainties: not even in relation to the laws of the physical universe, let alone as regards the delicate question of the way society should be constituted and governed. The truth - as Mill pointed out - is indeed likely to be divided between conventional and heretical views (to say nothing of those not yet formulated by man).

The second element of this contention is however, perhaps more valid. Is the confidence of Milton and Mill in the power of truth to emerge through the clash of conflicting ideas over-optimistic? It has been submitted that '/w/ide-spread discussion, freely engaged in, may... lead to no settlement of issues; /that/ /e/ven scholars and social scientists, supposedly trained in coming to conclusions on the basis of evidence, find it hard to get agreement among themselves'[1] - and that the task must be infinitely more difficult for the ordinary individual. This may be so; but it does not seem an adequate reason for denying the individual the opportunity to meet this challenge to human potential.[2]

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1 Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 4.

2 The fact that decision-making is considered so difficult is surely an indictment of the extent to which individuals have surrendered their autonomy to officialdom in the past. If we are out of the habit of thinking, there seems all the more reason to start cultivating it. If decision-making seems hard, it is either because we lack sufficient information to weigh in the balance or dislike the conclusion to which the evidence points. What is needed in both instances is a different perspective; and this is most likely to be achieved through maximising the flow of information.

(ii) Freedom of expression places too heavy an onus on the individual. Linked with the argument above, is the contention that '/people/ in general... are not really disposed to engage in the difficult process of hammering out serious issues, for they find mental effort the most onerous of work'.[1] Likewise, it has been submitted that some individuals are 'too ill-informed or emotional to make political decisions';[2] and that the great bulk of the population are incapable of resisting 'modern techniques of propaganda and subtle manipulation of the social environment'[3].

It is submitted, in refutation, that these arguments are fundamentally paternalistic and commensurately unacceptable;[4] that their corollary - viz, that the power of decision be given to those more "capable" of handling it - carries incalculable dangers of abuse; and that the best way to counter propaganda and indoctrination is through the unrestricted flow of information, opinion and ideas.

(iii) Exposure of abuse of power may be inimical to larger interests. 'Muldergate'[5], in South Africa, provides a classic illustration of this argument. Certain newspapers in the country exposed large-scale, secret misapplication

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1 Nelson & Teeter, supra, p 4.

2 Haiman, op cit, p 5.

3 Ten, op cit, p 129.

4 See the discussion on the dangers of such paternalism at p 10 above.

5 This term was coined as a combination of 'Watergate' and Mulder - the surname of the Minister of Information, at the time, who was one of the principal participants in the scheme outlined in the text below.

of public funds to finance propaganda for the Nationalist government. It was contended that this exposure was more harmful than beneficial to South African society as it tended to undermine legitimate security interests which the propaganda had been intended to promote.

Similar arguments have been raised in relation to Watergate itself (it weakened the United States in her conduct of foreign relations); or to revalations regarding United States' involvement in Vietnam[1]; or the activities of the Central Intelligence Agency (C.I.A.)[2].

In rejecting the validity of this argument, it is submitted that 'Muldergate' is also a classic illustration of yet another point: the principle mooted above that 'all power corrupts and absolute power corrupts absolutely'. Those in power are apt to guard it jealously; and there may be a very wide divergence in view between the government and the individual citizen as to what is appropriate in the promotion of such 'larger interests'. The free flow of information is essential to enable the individual to know what has been done on his supposed behalf and for his supposed benefit. At the same time, it must, however, also be acknowledged that a line may have to be drawn somewhere as to what the citizen can legitimately be told without

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1 See the celebrated Pentagon Papers Case: The New York Times v United States, 403, U.S. 713 (1971) and United States v The Washington Post, 403 U.S. 713 (1971), discussed, inter alia, in Abraham, op cit, pp 169-170.

2 See United States v Victor L. Marchetti, 466 F.2d 1309 (4th Cir. 1972), discussed, inter alia, by Nelson & Teeter, op cit, pp 53-54.

undermining state security; and the publication of information of direct benefit to an enemy - such as troop deployment in time of war - thus raises somewhat different considerations, (as further discussed below[1]).

(iv) Freedom of expression may serve to incite discontent. An example drawn from Mill may serve as a convenient starting point for examination of this contention. Notwithstanding his wide-ranging support for freedom of expression, Mill acknowledges that'one may prevent the opinion that corn-dealers are starvers of the poor from being delivered orally to an excited crowd assembled in front of the corn-dealer's house'[2]. Likewise, Mill is prepared to concede that the instigation of tyrannicide may, 'in a specific case,... be a proper subject of punishment, but only if an overt act followed, and at least a probable connection can be established between the act and the instigation'.[3]

Two points may immediately be made. The first is that the discontent (whether against the corn-dealer or the tyrant) mooted in these examples must inevitably have preceded the expression of the particular opinions: it was not created thereby. The plea by governments that "agitators" are stirring up dissension where otherwise there would be none is seldom borne out by the facts. To name but two examples, the French and Russian Revolutions resulted from real and hard-felt grievances. And where discontent exists, it is

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1 See p 23 below.

2 See Mill, On Liberty, cited by Ten, op cit, p 132.

3 Ibid.

far better that it should be aired and a solution sought; than that a false security should be obtained through its repression.

The second point is that - in either of Mill's illustrations - it is not the speech which is harmful: but the subsequent conduct. It may be countered that speech and conduct are so closely linked in such circumstances that speech itself must rank as destructive. This point - so long as violence remains current in human society-is difficult to meet. Emerson[1] attempts to do so (as previously described) by 'drawing a line in all cases between "expression" and "action";[2] insisting on absolute protection for expression simpliciter; and requiring that where a governmental regulation "affects both conduct consisting of action and conduct consisting of expression,... the regulation be drawn in such a way as to restrict only the action, leaving the expression uncurtailed'.[3] The difficulty of distinguishing between the two may, however, be severe - as Emerson himself acknowledges; and in some instances the speech itself may seem so clearly harmful that the case for its suppression may seem virtually irresistible. Thus, there may appear no other conclusion but that 'a group of white racists who march through a predominantly coloured neighbourhood, carrying racist placards and shouting racist slogans, may be stopped'.[4]

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1 Op cit, p 19, (cited by Dorsen, Bender and Neuborne op cit p 59, n c).

2 Ibid.

3 Ibid.

4 Ten, op cit, p 140.

However, if racist emotion continues to operate - and only its expression is checked - little of concrete value can be achieved. The cauldron of hostility will continue to bubble: and may explode into far greater violence than if the safety valve of free speech were allowed to dissipate some of the most highly charged tension. In addition, it must also be remembered that freedom of expression is indeed a seamless web: that its destruction in one context (no matter how laudable the aim) may ultimately lead to its elimination in others; and that there is considerable force in Mill's earnest enjoinder that:

> 'If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, then he, if he had the power, would be justified in silencing mankind.'[1]

(v) Speech may be the very antithesis of 'self-regarding' conduct and must be restricted in such instances.

This argument is closely linked to the preceding contention, but carries it several steps further. Thus, it is submitted that freedom of expression may cause harm to others in a number of different ways. It may result in violence, as mooted above; or undermine vital security interests (through for example, the disclosure to the enemy of troop movements in time of war[2]); it may injure the reputation, or impinge

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1 Mill, On Liberty, supra, p 79, (reproduced by Ten, op cit, p 124).

2 See p 21 above. The Falklands War of 1982, provides a recent illustration of this problem. Much controversy has centred around the role of the English media in depicting the conflict, it being alleged by the British armed forces that premature disclosure of information relating to the proposed landings of troops in the Islands exacerbated the loss of life.

upon the privacy, of the individual; it may prejudice fair trial or undermine public confidence in the administration of justice; it may offend against religious convictions or moral standards; it may cause needless panic (as illustrated by Mr. Justice Holmes' famous example of shouting 'Fire' in a crowded theatre when, in fact, there is no blaze[1]). In addition, it is contended that certain opinions - such as racist prejudices - are so divisive that they cannot be allowed free rein.[2] Problems of this kind undoubtedly admit of no easy solution; and have generated a consensus that freedom of expression cannot be absolute[3] - that some restriction is essential for the proper protection of interests of equal or greater importance. Accordingly, a number of attempts have been made to formulate appropriate criteria for determining when freedom of expression may legitimately be restricted - and these are considered in due course. Before turning to examination of the various tests suggested, however, it remains to consider a further objection to freedom of expression that may be considered particularly valid in 'developing'[4] countries.

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1 See Schenck v United States, 249 U.S. 47 (1919) at 52.

2 Thus, in the United Kingdom, for example, the Race Relations Act of 1976 has created the offence of 'incitement to racial hatred'.

3 Thus, even 'Supreme Court Justice Hugo Black, who often asserted that when the Founding Fathers said "no law" /in the First Amendment, as further explained below/ they meant literally that,... himself made many exceptions'. See Haiman, op cit, p 4.

4 A 'developing country' is defined in the McGraw-Hill Dictionary of Modern Economics, 2nd., ed., 1973, as 'a nation whose people are beginning to utilize available resources in order to bring about a sustained increase in per capita production of goods and services. In general, a developing nation is a country that is capable of greater substantial improvements in its income level and is in process of achieving this improvement.'

## 1.3.3. The Special Significance of 'Development Journalism'

A convenient starting point for examination of this difficult issue is provided by Emerson - a highly committed proponent of free speech - who nevertheless submits that 'an effective system of freedom of expression'[1] depends upon the fulfillment of a number of criteria. He identified these as follows:

> 'There must be a substantial consensus on the values and goals of the society - some minimum area of agreement or acquiescence. The economic structure must provide a certain standard of material welfare, shared broadly by all elements of the population. Political institutions must have some basis in the traditions of the people, must receive some degree of acceptance, must prove reasonably effective in meeting the problems of the society, and must remain capable of adjustment and change... There must be some feeling of security in relation to other nations or societies. The education system, the media of communication, and similar institutions molding public opinion must have some capacity to produce mature and independent members of the local and national community. The general philosophy, attitudes and mental health of the citizenry must be favourable. In short, basic conditions for a viable democratic society must be present.'[2]

The first point which should be noted is that Emerson describes these factors as important conditions for 'an effective system of freedom of expression'[3]. He does not suggest that - in the absence of these conditions - freedom of expression should be rejected. Yet this is the contention which is increasingly being propounded by Third World states facing major development problems. The question is not an

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1 T.I. Emerson, Toward a General Theory of the First Amendment, 1966, reproduced by Dorsen, Bender and Neuborne, op cit, p 17.

2 Ibid.

3 Supra, emphasis supplied.

easy one - and the issues involved are perhaps best appreciated in the light of a concrete example. The illustration below is drawn from Tanzania, but is equally apposite to the majority of developing countries.

Shortly after the inception of the policy of ujamaa villages, 'involving /the resettlement of/ peasants in communal agricultur/al/ /projects/[1]', reports reached journalists in Tanzania of a particular village settlement scheme which had badly failed: with '/l/arge sums of money ha/ving/ been lost and villagers who had been brought to the scheme ha/ving/ left'[2]. The journalists were in a dilemma as to how they should report this failure - if at all. Many people were suspicious of the ujamaa concept and the report of the failure of this settlement 'would reinforce existing doubts and might well sway the undecided against the policy'[3]. Furthermore, the report would 'only spread "confusion" at a time when the government was launching a political education campaign through the party and the mass media to encourage positive attitudes towards living in villages'.[4] On the other hand, was it not the press's duty to report the failure in full? Not only because public resources had been wasted (and investigation was needed to prevent this recurring); but also - and perhaps even more importantly - because '/g/ood policies and appropriate decisions /can only

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1 Graham Mitten, 'A Third World News Deal? Tanzania - a case study'. /1977/ 6 Index on Censorship, pp 35-46, p 35.

2 Ibid. The particular settlement was not in fact organised on an ujamaa basis, but this might not have been fully appreciated by the general population.

3 Ibid.

4 Ibid.

be/ based on knowledge of the facts /and/ /i/f newspapers did not report /the/ facts, then how could policy makers or the people make good decisions?'[1] Was a "compromise" possible, in which the failure should be reported, but with 'great care'[2] - bearing in mind that the elected government was entitled to cooperation from the press, that the ujamaa policy was designed to help the poor and underprivileged and that 'the press could help in /its/ implementation by making sure that Tanzanians understood what was involved and what was expected of them'?[3]

The first and third of these possible approaches to the problem of reporting reflect different degrees of 'development journalism'. This concept was first developed - through inter alia the Phillipine Press Institute[4] - during the 1960s. 'Those who conceived /the concept/ believed that because national development depends so heavily upon economics there should be better trained and informed economic specialists among journalists, to cover and report fully, impartially and simply the myriad problems of a developing nation'[5]. During the 1970s, however, as Third World governments realised that development journalism could be used

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1 Ibid, p 35.

2 Ibid.

3 Ibid.

4 Developments in other parts of Asia were also significant; and an important role was played, in addition, by the Press Institute of India and the Asian Programme of IPI, and, particularly, by the Press Foundation of Asia, established in 1967, to promote development journalism. See John A. Lent; 'A Third World news deal? The guiding light', /1977/. 6 Index on Censorship pp 17-26, p 17.

5 Lent, ibid, p 17.

to promote particular development strategies, 'the term was transformed into commitment journalism systematically applied to a nation's problems'.[1]

1.3.3.1. The Arguments in Favour of 'Development Journalism'

The principal arguments in favour of development journalism - so defined - include the following:

(i) 'Because Third World nations are newly emergent, they need time to develop their own institutions. During this initial period of growth, stability and unity must be sought; criticism must be minimised and the public faith in governmental institutions and policies must be encouraged.'[2]

(ii) The priorities of a developing nation are immediate material needs such as food, shelter, energy and health. Freedom of communication ranks below these imperatives and - indeed - the duty of the media is to promote the satisfaction of these requirements by reporting positively on steps taken in the process, rather than by voicing negative criticism.[3]

(iii) In a society in which the great majority of the population has no formal education, the publication of conflicting policies or of criticism of existing policies is confusing to the people and hinders the attainment of development goals.[4] This difficulty is exacerbated by the tendency of people to whom literacy is a new phenomenon to

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1 Ibid.
2 Ibid, p 18.
3 See Lent, op cit, p 18.
4 See Mitten, op cit, p 42.

take everything they read as 'gospel truth'.[1]

(iv) Investigative and critical journalism, as practised in the West, has no counterpart in traditional culture and may cut across long-held values (such as respect for elders); and also provoke a far more volatile reaction than would be the case in societies more accustomed to this role of the media.[2] Linking this difficulty with the first argument for 'development journalism' described above[3], a Nigerian editor /has/ explained /that/:

> 'A news item or editorial concerning government that would raise eyebrows in London can incite inter-tribal riots or violent anti-government demonstrations in an African country. It may bring down a government, and when there is no organised opposition party, or when it is not ready to be the alternative government, there will be anarchy'.[4]

(v) Certain values are of overriding importance in society and the media's proper task is to promote them at all times. This contention is perhaps best described in the words of Julius Nyerere[5] as follows:

> 'If these principles (of love, sharing, unselfishness, hard work, cooperation etc.) are to be preserved and adapted to serve the larger societies which ha/ve/ now grown up, the whole of the new modern educational system must also be directed towards inculcating them. They must underlie all the things taught in the schools , all the things broadcast on the radio, all the things written in the press. And if they are to form the basis on which society operates, then no advocacy of opposition to these principles can be allowed'.[6]

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1 See Frank Barton, The Press of Africa, London, 1979, p 4. He submits that the press of Africa still has a mystique which the greater marvels of radio and television do not rival. If something is 'in the paper', it has a status of its own - a condition still largely true even in much more sophisticated societies.'

2 Lent, supra, p 17.

3 See p 28 above.

4 See Derek Ingram, 'Commonwealth Press: The Years of Challenge in the New Framework of World Information' Feb-Mar.1976, Commonwealth, p 7, cited by Lent, ibid, p 19.

5 Julius Nyere, Freedom and Unity, London and Dar es Salaam, Oxford University Press, 1967, cited by Mitten, op cit, p 36.

6 Ibid, p 14.

(vi) Privately-owned and independent media cannot be trusted to serve the interests of the voiceless majority. Privately-owned media inevitably devolve into the hands of a wealthy few, who 'by their very nature, represent only commercial, sectional or foreign interests'[1], and have less concern for promoting the welfare of the people than has the national government.

(vii) Development journalism does not necessarily derogate from press freedom and it is typically western arrogance towards the Third World to assume that it does. Just as the 'existence of a Ministry of Education does not necessarily mean that we are on the road to Orwellian control of education or brain-washing'[2], so too, the desire to provide news directly relevant to the needs and aspirations of developing societies /does not/ necessarily involve suppression of press freedom'[3]. The West, however, in 'ethnocentric arrogance' assumes that press freedom is its particular prerogative and views the Third World as 'incapable of self-regulatory freedom... in the field of communications /as elsewhere/'[4].

So much, then, for the main arguments in favour of 'development journalism'. It remains to consider the opposing view.

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1 Mitten, op cit, p 44.

2 Phil Harris: A Third World news deal? Behind the Smokescreen', /1977/ 6 Index on Censorship, pp 27-34, p 28.

3 Ibid, at p 29.

4 Ibid, p 28.

1.3.3.2. The Arguments Against Development Journalism

The arguments against development journalism include the following:

(i) "A house built on shale cannot stand". Whilst it is true that Third World nations are yet young, that their unity - within the artificial boundaries devised by the colonial powers - is precarious, and that their political institutions in many instances lack the support of tradition and sit somewhat uneasily upon their newly formed societies, it does not follow that the dampening of criticism and the suppression of a free flow of information are the best means of ensuring unity and stability in the long term. The repression of dissent may create the appearance of security; but if the schisms remain present, they will ultimately re-appear. The best way to formulate lasting policies and to develop political institutions suited to the particular society is to do so on the basis of all relevant information - and the suppression of certain facts or ideas in the interests of development journalism (or any other goal) inevitably militates against this.

(ii) There is no evidence that development goals are best served by the suppression (or slanting) of information. It is submitted - echoing the argument above - that viable and effective policies for the resolution of the grave and intractable problems of development can only be formulated in the light of all relevant information and by taking due account of every failure and setback. Furthermore,

even it it is accepted that freedom of expression must take second-place to development goals, the question remains as to '/w/ho /is to/ decide that a nation has reached that goal? /Moreover/, /a/ssuming it has reached its desired stage of development, will that nation's ruling clique, which has become accustomed to hearing only good things said about itself, be willing to allow the media to criticise constructively? And even if the rulers do allow this criticism, will the media, after years of guidance and self-restraint, be trusting, prepared and bold enough to accept the challenge?'[1] In the long run, therefore, will not development itself be the loser?

Furthermore, there is no guarantee that it is only in the long term that effective development may be impeded. The development policies adopted by a particular government may not be the best - objectively - for the society: as, arguably, illustrated by the decision of a number of Third World governments to introduce nuclear power at a time when the United States, for one, is curtailing its own nuclear power programme in favour of other options. This change of policy in the United States is undoubtedly the result of a combination of many different factors: but public concern regarding the risk of nuclear accident must surely rank as one. Are the people of the Third World to be deprived - through the principle of 'development journalism' - from being fully acquainted with the dangers involved and from being given an opportunity to make their views known?

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[1] Lent, op cit, p 26.

A further complicating factor is the suspicion with which the general population may regard media messages extolling a particular development policy. 'In many Third World societies... people are generally suspicious of officialdom, having witnessed so much government inefficiency, corruption and insincerity in the past'[1]; and 'if the critical function of... the media /is/ stifled'[2], how is public confidence to be restored?

Persistent outpouring of 'good' development news may also engender a sense of frustration amongst people in fact experiencing considerable difficulties. In this regard, the experience of Mitten[3] in Tanzania is salutary. He reports:

> 'On my travels in Tanzania I frequently had the view expressed to me by people who were in no way anti-government, that they felt no one knew about their particular problems. If the news media, and in particular the radio, reported people's real problems and concerns more often, they might have allayed the frustration that some people felt. When the press and radio reported news from the regions and districts, they mostly reported happy events, nation-building activities, speeches of leaders and so on. To some people this must have given the news media an air of unreality; more likely it gave them the unhappy feeling that they were the only people who were suffering difficulties'.[4]

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1 Ibid.
2 Ibid,
3 Mitten, op cit,
4 Ibid, at p 46.

(ii) Development journalism is arrogant, elitist and paternalistic. In assuming that the general population will be "confused" by being offered a choice of policies or by being informed of the difficulties encountered in particular projects, the principle of development journalism evinces a contempt for the ordinary individual. Common sense and the capacity to distinguish good from bad do not depend on formal education, as Third World support for the advantages of traditional culture implicitly acknowledges. Whilst some government guidance may well be required in the complexities of the modern world, it should also be recalled that man - over centuries - has shown himself well capable of absorbing new technologies of demonstrated superiority. And if there is doubt as to the utility of particular development policies, the solution lies not in coercion but rather in persuasion: and the latter - to be effective - must be based upon as comprehensive a review as possible of all the risks and benefits entailed. It must always be remembered that the ordinary individual is well capable of discerning any discrepancy between his own experience and the view put forth by the media - as Mitten's report from Tanzania (described above[1]) graphically demonstrates.

(iv) Corrupt and selfish leadership deserves no respect and its exposure is required in the best interests of society as a whole. Moreover, any attempt to "paper over the cracks"

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[1] See p 33 above.

is likely - in the end - to result in far greater violence and attendant anarchy; whilst, the view that the ordinary people cannot be trusted with bad news about government is - again - fundamentally paternalistic.

(v) Critical and investigative journalism does not undermine the importance of love, sharing or cooperation. On the contrary, such journalism is premised on high moral standards and may help to promote these values by exposing selfishness or corruption which might otherwise flourish undetected. Moreover, whilst the "sharing" ethic of socialism may well have greater intrinsic value than the "competition" of "self-reliance" ethic of capitalism, the interests of society are best served - not be promoting one and denigrating the other - but by examining (in full) the advantages and disadvantages of both ideologies; and attempting to develop a system which incorporates the best of both.[1]

(vi) Privately owned media are dependant on sales and advertising revenue and can never, therefore, entirely ignore the interests and wishes of their customers.[2] On

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[1] See Raphael Mergui 'UNESCO: The state and the media', /1981/ 1 Index on Censorship, pp 23-26, p 24. See also Mitten, op cit, p 44, who points out that Nyerere's statement (reproduced above) should be read in the light of the importance attached by him to winning over the 'vitally important class of entrepreneurs, middle managers and other professional and executive people' to the cause of socialism. This aim of Nyerere seems implicitly to acknowledge the advantages of 'marrying' these ideologies.

[2] See Mergui, ibid, p 26.

the other hand, many Third World governments are not democratically elected; and there can be no guarantee that news media - in obeying their directives - are any more responsive to the interests of the majority.

(vii) Freedom of expression is a value which transcends geographical, ideological and cultural boundaries and is an important check on the abuse of power in any society. 'It is a general rule, in all societies, that power rests on knowledge'[1]; and if government is permitted to obtain a monopoly on the dissemination of information, there is a grave danger that it may degenerate into Orwellian dictatorship. 'Developmental journalism' has a far more attractive ring than 'thought control' but the difference - in practice - may not be great. Moreover, the value of independent media in exposing abuse of power and in compelling re-examination of government policies has been graphically demonstrated by the role of the press both in the Watergate Scandal and in promoting the end of the Vietnam War[2] (to name but two examples). The message from these experiences is clear; and is applicable throughout the world.

In conclusion, it is submitted that - compelling though the arguments in favour of developmental journalism may seem - they cannot override the objections described above. The countervailing arguments are not easily summarised but - at the risk of gross oversimplification - may perhaps be

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1 Mergui, op cit, p 26.

2 Ibid.

marshalled together as follows: Development journalism is intrinsically autocratic, ultimately inefficient, and fundamentally paternalistic; and it leaves little room for the ideal of self-determination, which has been proclaimed throughout the world as an aim of all societies.

### 1.3.3.3. Further Ramifications of Developmental Journalism and its Proper Place vis-a-vis Free Expression

Before leaving the topic of development journalism, it should be noted - in passing[1] - that it is closely related to increasing Third World demands for a New World Information Order.[2] Third World governments - having adopted the policy of development journalism as regards their national media - are concerned that the international news media should be governed by the same principle; and that 'communication should be considered a major development resource'.[3]

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1 The question here raised lies outside the scope of this study.

2 As further explained below, this demand centres principally around the need to temper the present dominant position of Western news agencies in collecting and disseminating international news. As such, it falls beyond the ambit of this dissertation and cannot be examined in full. For further information, however, see the 1980 Report of the UNESCO Commission established to examine the question, entitled 'Many Voices, One World'; and for comment on the origins and significance of the debate see Lent, op cit, Harris, op cit, Mergui, op cit, Frank Barber, 'UNESCO: Threat to Press Freedom', [1981] 1 Index on Censorship, pp 15-22; and Rosemary Righter, Whose News? , London, 1978.

3 Many Voices, One World, Report of the UNESCO Commission for the Study of Communication, 1980, p 258.

The heart of their concern centres, however, around the present domination of the flow of international news by four major Western agencies - Associated Press and United Press International in the United States, Agence France Press and the British agency, Reuters.[1] This, the Third World asserts - with considerable legitimacy - results in a 'one-way' flow of information in which the developed world receives little information regarding the Third World and that usually of the "crisis" variety,[2] whilst Third World countries are unable to obtain information about each other except through the distorting medium of the Western agencies.[3] Detailed consideration of the complex issues raised by Third World complaints lies outside the scope of this study, however; and it is instead proposed to return to the major question of present concern - the extent to which freedom of expression may properly be limited (if at all) through the aims of development journalism.

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1 See Righter, supra, pp 23-24.

2 Thus reports regarding Third World countries tend to centre around crises, such as a coup, flood or famine, rather than progress in the development battle. See Harris, op cit, who points out that '/t/he Third World rarely surfaces into Western consciousness, and when it does it is a world plagued by catastrophe, whether this be natural (floods, earthquakes, etc.,), mechanical (plane and train crashes) or political (coup d'etat, assassinations, kidnaps, terrorism and guerilla warfare.)'

3 Thus, one obvious distortion is seen as being the "crisis" reports described above. In addition, the Third World claims that it 'is entitled to hear African journalists talking about Africa, Latin American journalists talking about Latin America and Asian journalists talking about Asia'. See Harris, ibid.

It has already been submitted that freedom of expression should not be sacrificed in toto, to development journalism as an overriding policy. However, it is certainly arguable that the promotion of development is an interest which ranks equally with those previously identified[1] as deserving protection (such as the state's interest in security and the individual's concern with privacy and protection of reputation); and that development journalism should, therefore, be treated in the same way. Thus, freedom of expression may be obliged to yield to the interests of development journalism, as to other concerns, in certain circumstances: whenever the occasion is "appropriate". But when is the occasion "proper"? What criteria should be applied to determine this? The question is of immense importance and equal difficulty - and no complete solution to it has yet been found. Considerable attention has, however, been given to the problem by the United States' Supreme Court; and the tests suggested by that Court accordingly provide a convenient starting point for further discussion.

## 1.4. The Criteria for Restricting Freedom of Expression in The United States

The First Amendment to the United States' Constitution guarantees freedom of expression in a way which is strikingly wide. It states - in short, sharp terms - the sweeping principle that: 'Congress shall make no law... abridging freedom of speech, or of the press...'[2]. The uncompromising

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[1] See p 23 above.

[2] See Nelson & Teeter, op cit, p 8.

nature of this guarantee which, prima facie, 'admits of no exceptions' has been emphasised by Meiklejohn[1] and has led Supreme Court Justice Hugo Black to declare:

> 'It is my belief that there are "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be "absolutes"... It /the First Amendment/ says "no law", and that is what I believe it means'.[2]

Notwithstanding the clear terms of the First Amendment (or the view of Mr. Justice Black described above), the Supreme Court has - in general - taken the approach that freedom of expression cannot be an absolute right; and that it must indeed yield to competing interests in certain circumstances. The attempt to formulate suitable guidelines for restriction (in the absence of any statutory criteria) has however, presented the Court with intractable difficulty - as illustrated by the following brief survey of some of the principal tests[3] evolved by it over the years.

(i) Prior Restraint.

Derived from the writings of Blackstone[4], this principle affirms that expression must always be permitted in the

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1 Alexander Meiklejohn, Testimony of November 14, 1955, U.S. Senate, Committee on Judiciary, Sub-Committee on Constitutional Rights, "Security and Constitutional Rights", pp 14-15, (cited by Nelson & Teeter, ibid).

2 Black, 'Justice Black and First Amendment "Absolutes": a public interview', 37 N.Y.U.L. Rev 548 (1962), (cited by Nelson & Teeter, ibid).

3 For brief description of these and other tests utilised by the Court, see Dorsen, Bender and Neuborne, op cit, pp 51-59.

4 Sir William Blackstone, Commentaries, 1765-1769, in which he asserts: 'The liberty of the press... consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published'. See Nelson & Teeter, op cit, p 7.

first instance, even though it may subsequently be punished if it is found to contravene a recognised interest, such as protection of individual reputation. Thus, no "prior restraint" may be placed on publication - even though the media may subsequently be "damned"[1] therefor. The operation of the principle is illustrated by the case of Near v Minnesota[2], in which the Supreme Court declared invalid an injunction prohibiting publication of a Minneapolis 'smear sheet'[3]; and by the Pentagon Papers' case[4] in which the Court similarly discharged injunctions precluding the New York Times and Washington Post from publicising a confidential Pentagon report on United States' involvement in Vietnam.[5] In neither case, however, was the Court prepared to concede that the prohibition of "prior restraint" against publication is absolute. Thus, in Near v Minnesota, the Court acknowledged that prior restraint might well be justified to uphold security and to protect against obscenity[6]; and in the 'Pentagon Papers' case, the majority decision was based on the government's failure, in the particular circumstances, to show that restriction on

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1 Hence, the well-known aphorism: 'Publish and be damned'. The media may say what it pleases, but must suffer the consequences. The crucial element of the principle, however, it that the media cannot be precluded from having its say in the first instance.

2 Near v Minnesota, ex re. Olson, 283 U.S. 697 (1931), discussed in further detail below.

3 The case is discussed in further detail below; and suffice it therefore for present purposes to note that the language of the newspaper was extreme, that it laid severe charges of dereliction of duty against law enforcement agencies and that it vilified Catholics and Jews.

4 New York Times Co. v United States, 403 U.S. 713 (1971).

5 The Court's reasoning is further explained in the text below.

6 Near v Minnesota, ex rel. Olson, supra, at 716.

publication was indeed necessary in the interests of security - the implication being that if the government had been able to provide stronger evidence of risk to national safety, the injunction against publication would have been upheld.[1]

In summary therefore, the Supreme Court has emphasised the general principle that there should be no prior restraint on publication - but has also acknowledged that this principle is not absolute, and has provided little guidance as to the circumstances in which it may be obliged to yield to competing, overriding public interests.

(ii) Clear and Present Danger

First formulated in Schenck v United States[2], this principle provides that freedom of expression may not be restricted except where there is a clear and present danger that it will result in substantive evil to society. In assessing the risk of this, the courts are enjoined to consider whether 'the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'[3]. Attractive though this

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1 Only two of the Supreme Court Justices - Black and Douglas - expressed firm opposition to any system of prior restraint, in the interests of 'uninhibited, robust and wide-open debate'. See New York Times Co v United States, supra, at 724.

2 249 U.S. 47, (1919), discussed further below.

3 Dennis v United States, 341 U.S. 494 (1951), at 510. In this case, as further discussed below, the Supreme Court attempted to give further meaning to the test, as propounded in Schenck v United States, by adopting this additional principle.

principle may seem, its practical application is fraught with difficulty - as the experience of the Supreme Court itself graphically demonstrates. Thus, in Dennis v United States,[1] the doctrine 'was so variously interpreted by the five opinions /delivered in the case/ that its usefulness was eroded'[2]; and it stood revealed as a most uncertain yardstick.

(ii) Bad Tendency.

According to this principle, enunciated in Gitlow v New York [3], freedom of expression may be restrained where it would have a tendency to bring about some social evil, such as the corruption of public morals or the disturbing of public peace. It needs no emphasis that a principle of this kind leaves a very wide margin for the suppression of publication; and it seems that this test has now been rejected in the United States as being too wide.[4]

(iv) Preferred Freedom.

This principle affirms that freedom of speech and of the press are rights of particular importance, being the 'indispensable condition of liberty'.[5] It follows that any law prima facie restricting these freedoms must be subjected to special scrutiny, the onus lying on the state to show

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1 Ibid.

2 Nelson & Teeter, op cit, p 41.

3 268 U.S. 652 (1925), discussed further below.

4 See Dorsen, Bender & Neuborne, op cit, p 57.

5 See Nelson & Teeter, supra, p 11.

that 'the speech or print under challenge... endangers a major social interest'.[1] The value of the principle is illustrated by the 'Pentagon Papers' case[2], in which the Supreme Court held that the Government had failed to discharge the heavy onus of establishing that restriction of publication was required in the interests of state security. Apart, however, from thus shifting the burden of proof on to the state, the principle provides minimal guidance as to how - in practice - the onus should be held to have been discharged; and it therefore does little to resolve the dilemma.

(v) Incitement to Action.

This principle, articulated in Brandenburg v Ohio[3], affirms that the advocacy of force or civil disobedience to obtain redress of grievances cannot be restricted except where 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.[4] Again, however, the test is inherently uncertain for the concept of 'imminence' is intrinsically vague; and prophecies of what is 'likely' are notoriously inaccurate. Moreover, the principle is also open to criticism in that 'it is capable of being manipulated by the courts to cut off speech just when it becomes close to being effective.'[5]

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1 Ibid.

2 New York Times Co v U.S. 403 U.S. 713 (1971), discussed briefly above at p 41 - 42.

3 395 U.S. 444 (1969), discussed further below.

4 Ibid, at 447, emphasis supplied.

5 Dorsen, Bender & Neuborne, op cit, p 59.

## 1.5. The Risk of Excessive Restriction

From the above brief survey alone, the difficulties endemic in attempting to formulate suitable guidelines for determining when freedom of expression may legitimately be restricted in order to protect other interests are readily apparent. From its attempts to grapple with the problem, the Supreme Court has wrested a number of principles - but none is particularly satisfactory and all suffer from the defect of uncertainty. The danger is always that the net of restriction will be thrown too wide: with the result that 'freedom of expression will become the exception and suppression the rule.'[1] To avoid this happening, the permitted derogations from the principle of free expression must be formulated with clarity and precision. However, this is easier said than done, as 'the infinite varieties and subtleties of language and other forms of communication make it impossible to construct a limitation upon expression in definite terms'.[2] Moreover, the risk of excessive restriction being imposed is compounded by the fact that limitations imposed to protect certain interests are essentially aimed at prevention; and 'like all preventive measures, /they/ cu/t/ far more widely and deeply than is necessary'[3] - in reality - to preclude the threatened danger. Furthermore, the repression of free expression generates its own momentum: being likely to contribute to the atmosphere

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1 Emerson, The System of Freedom of Expression, 1970, reproduced by Dorsen, Bender and Neuborne, op cit, p 13.

2 Ibid.

3 Ibid.

of fear and insecurity which prompted the imposition of controls in the first instance, and so prompting further calls for yet more stringent restriction. There is, accordingly, good reason for concluding that 'the limitations imposed on discussion, as they operate in practice, tend readily and quickly to destroy the whole structure of free expression'.[1] Maintaining freedom of expression is thus no easy task; and there is, accordingly, much force in the following observations of the renowned Professor Emerson, that 'the problem of maintaining a system of freedom of expression in a society is one of the most complex any society has to face;[2]' and that it calls for a high degree of self-restraint and self-discipline; and a willingness - despite the pulls of emotion - to sacrifice immediate interests to longer term and more nebulous goals.

## 1.6. The Increasing Recognition of the Importance of Free Expression

Given all the difficulties of maintaining freedom of expression in practice, it is both interesting and encouraging to note the increasing recognition being accorded to the importance of freedom of expression in both international covenants and municipal legal systems. On the international plane, the twentieth century has witnessed a burgeoning awareness of the importance of respect for human rights in

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1 Ibid.

2 Ibid.

general, - as reflected, inter alia in the Preamble to the Charter of the United Nations, which identifies two of the principal aims of the organisation as being:

> '... to reaffirm faith in fundamental human rights /and/ in the dignity and worth of the human person... /and/ to promote social progress and better standards of life in larger freedom'.[1]

Since the adoption of the Charter in 1945, the importance of promoting human rights has been affirmed in a number of international convenants: and freedom of expression is one of the principal rights which has been emphasised as needing protection. Thus, the Preamble to the Universal Declaration of Human Rights of 1948[2] declares that 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people'[3]; and Article 19 of the Declaration asserts that 'Everyone has the right to freedom of opinion and expression; /and that/ this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.[4]

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1 This, and other provisions of the United Nations Charter which are relevant to the protection of human rights are reproduced in Ian Brownlie, ed., Basic Documents on Human Rights, 2nd ed., Oxford, 1981, pp 3-14.

2 The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10 December 1948. The Declaration is not a legally binding instrument as such, but, in the view of Brownlie, ibid, p 21, it 'has its own importance and cannot be regarded as having merely an historical significance'. For further analysis of its effects, see Brownlie, ibid, and the further texts cited by him.

3 See Brownlie, ibid, p 21 for a reproduction of this provision.

4 See Brownlie, ibid, p 25 for a reproduction of this provision.

The International Covenant on Civil and Political Rights, which was adopted in 1966[1], also guarantees freedom of expression (though in more detailed (and possibly[2]) more restrictive terms). Thus Article 19 provides:

'1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights and reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.'[3]

Regional treaties also confirm the need to protect freedom of expression. Thus, the European Convention on Human Rights of 1950 guarantees freedom of expression in the following terms:

'Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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1 Brownlie, op cit, p 128.

2 This provision which clearly authorises a number of derogations from the rights, contrasts considerably, prima facie, with Article 19 of the Universal Declaration which does not expressly authorise any exceptions. However, some restriction must nevertheless be permitted under the latter provision to protect competing interests in appropriate circumstances as has been held in relation to the far more robustly phrased First Amendment of the Constitution of the United States of America (as discussed above).

3 See Brownlie, supra, p 135, for a reproduction of this provision.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'[1]

In addition, the American Convention of Human Rights of 1969 guarantees 'Freedom of Thought and Expression' in the following manner:

'Article 13

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

(a) respect for the rights or reputations of others; or

(b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio, broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses pubishable by law.'[2]

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[1] See Brownlie, op cit p 246 for a reproduction of this provision.

[2] See Brownlie, ibid, p 397.

A related important provision of the American Convention is Article 14 which states:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.'[1]

Furthermore, the African Charter on Human and Peoples' Rights, adopted by Heads of State at the Organisation of African Unity Summit held in Nairobi in 1981, and which will become effective upon its ratification by 26 states,[2] contains a brief guarantee of freedom of expression in the following terms:

'Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law'.[3]

At the level of municipal law, a great number of states guarantee freedom of expression in their constitutions, as illustrated by the following brief survey:

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1 See Brownlie, ibid, p 398.

2 See (1981) Vol 7 Commonwealth Law Bulletin, p 1058.

3 Ibid.

The Constitution of Argentina of 1853 (as amended) guarantees, in Article 14, that '/a/ll inhabitants of the Nation enjoy /certain/ rights, in accordance with the laws that regulate their exercise, /including the right of/ publishing their ideas through the press without previous censorship'.[1]

The Constitution of the People's Republic of Bangladesh of 1972, as amended, guarantees freedom of expression, in Article 39, as follows:

'1. Freedom of thought and conscience is guaranteed.

2. Subject to any reasonable restrictions imposed by law in the interests of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence -

(a) the right of every citizen to freedom of speech and expression; and

(b) freedom of the press

are guaranteed.'[2]

The Constitution of the Czechoslovak Socialist Republic of 1960 provides in Article 28:

'1. Freedom of expression in all fields of public life, in particular freedom of speech and of the press, consistent with the interests of the working people, shall be guaranteed to all citizens. These freedoms shall enable citizens to further the development of their personalities and their creative efforts, and to take an active part in the administration of the state and in the economic and cultural development of the country. For this purpose freedom of assembly, and freedom to hold public parades and demonstrations, shall be guaranteed.

2. These freedoms shall be secured by making publishing houses and printing presses, public buildings, halls, assembly grounds, as well as broadcasting, television and other

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1 See Albert P. Blaustein and Gisbert H. Flanz, Constitutions of the Countries of the World, New York, 1982, Vol. I.

2 Blaustein & Flanz, op cit, Vol. II.

facilities available to the working people and their organisations' [1].

The Constitution of the Kingdom of Denmark Act of 1953 affirms in brief terms in section 77:

'Any person shall be entitled to publish his thoughts in printing, in writing and in speech, provided that he may be held answerable in a court of justice. Censorship and other preventative measures shall never again be introduced'.[2]

The Constitution of Japan of 1946 also guarantees free speech in Article 21, as follows:

'Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated'.[3]

The Political Constitution of Peru of 1979 also affirms, in Article 2.4. the individual's right:

'To the freedom of information, opinion, expression, and diffusion of ideas through words, writings, or visual means, by any mass medium, without previous authorization, censure or impediment of any kind subject to sanctions under the law.

Crimes committed through books, the press, and other mass media are detailed in the Criminal Code and are adjudicated in ordinary courts.

Also considered a crime is any measure that suspends or closes any organ of expression or hinders its free circulation.

The rights to inform and express an opinion include those of establishing communications media.'[4]

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1 Ibid, Vol. V.

2 Ibid, Vol. V..

3 Blaustein & Flanz, op cit, Vol. IX.

4 Ibid, Vol. XII.

In addition, the great majority of "new" states within the Commonwealth, (those which have attained independence since 1960) have included within their constitutions Bills of Rights which are modelled on that of Nigeria (the first British colonial dependency to incorporate such provisions[1]) and which reflect the terms of Article 10 of the European Convention on Human Rights[2]. Thus, to take one of the more recent examples, the Constitution of Tuvalu of 1978 provides, in section 12, that:

'1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the privacy of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) for the imposition of restrictions upon public officers.

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to

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1 The reason such a Bill of Rights was adopted in Nigeria and the effect which this had on other British dependencies as they reached independence is further discussed below.

2 See p 173, below.

be reasonably justifiable in a democratic society'.[1]

The above survey is, of course, by no means comprehensive. It serves to illustrate, however, the recent awakening of concern for human rights in general - including freedom of expression - and thus to demonstrate that there is indeed an increasing recognition of the importance of free expression throughout the world. However, these national and international guarantees also serve to underline - once again[2] - the fundamental dilemma which surrounds the right to freedom of expression. On the one hand, free expression is clearly recognised as a right of great importance, which merits special protection. On the other hand, however, it is equally acknowledged that it is a right which cannot be absolute and which must yield - in certain circumstances - to other interests, considered more important by society in these instances. Whilst so much is apparent, however, the difficulty of determining what those circumstances are - and of defining where the line between freedom and restriction should be drawn - appears almost entirely insoluble.

## 1.7. The Dilemma of Free Expression and its Practical Resolution

The dilemma surrounding freedom of expression lies thus in the intractable difficulty of attempting to reconcile interests

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1 Blaustein & Flanz, op cit, Vol XV; Tivalu Independence Order 1978.

2 The difficulty of determining appropriate tests for restriction has, of course, previously been described in the context of United States' experience.

which are fundamentally at odds. Moreover, factual circumstances vary too greatly for hard-and-fast rules to be laid down; and little guidance can therefore be obtained from detailed prescriptions of limitations which go further than is either necessary or appropriate to protect society's legitimate interests. It is submitted, however, that - in practice - it is indeed possible to recognise excessive restriction and limitation when this phenonemon occurs. The practical resolution of the dilemma lies thus in promoting a sense of vigilance against unnecessary retraint; and in developing a firm, clear commitment to individual liberty and media freedom, founded on courage, objectivity, self-restraint and maturity.

It is accordingly proposed to move away from the theoretical debate at this stage; and to focus instead on freedom of the media as experienced in one particular society, in order to determine whether the legal limitations in fact imposed upon the press go beyond the bounds of what is necessary to protect competing interests. It is further proposed to conduct this examination in the context of Nigeria: a country which - for a number of reasons, as further explained in Chapter Two below - provides a rich and instructive backdrop for this inquiry.

# CHAPTER TWO

# INTRODUCTION TO NIGERIA

## 2.1. The Significance of this African State

Nigeria is the largest, most populous and - by virtue of her oil resources - the wealthiest of the black African states. She is also a leader in many other respects. She was one of the first states in Africa to attain independence from Britain[1]; and - although she has suffered a number of vicissitudes since (including a brutal civil war and thirteen years of military government) - she has recently returned to civilian rule[2] under a constitution which breaks new ground within the Commonwealth, being modelled on a "Washington" rather than a "Whitehall" pattern[3]. It thus represents a significant step in the attempt to develop political institutions which marry democratic principles with strong effective leadership; and thus provides an example which many other Third World states may find well worth the studying. Moreover, the civilian government has been in office for close on four years; and this in itself is a remarkable achievement - given the difficulty a number of other states have experienced in keeping the military out of government when once they have assumed this role.

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1 This was in 1960.

2 This was in 1979.

3 See James S. Read, 'The New Constitution of Nigeria, 1979: "The Washington Model"?, (1979) 23 Journal of African Law, pp 131-174.

Nigeria has thus provided an important lead in this regard as well. These recent events should not, however, be allowed to obscure the importance of the lead provided by Nigeria in the more distant past. In 1959, Nigeria also broke new ground within the Commonwealth by incorporating within her constitution a Bill of Rights, based upon the European Convention on Human Rights of 1950, and which has served as a model for the great majority of new states within the Commonwealth, which have incorporated similar provisions within their constitutions on their attainment of independence.

From the viewpoint of the media, Nigeria was one of the first African states (south of the Sahara[1] and north of the Limpopo[2]) to establish a viable local newspaper[3]. Its press is widely regarded as the freest in Africa[4]; and appears to take considerable pride in its educative and 'watchdog' role[5], being quick to denounce any curtailment

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1 The first newspapers in Egypt were established after Napoleon's occupation of the country in 1797. See Frank Barton, The Press of Africa, London, 1979, p 5.

2 Newspaper publication commenced in the Cape in 1800 with the production of the Cape Town Gazette. See Barton, ibid.

3 The first successful daily in West Africa was the Lagos Daily News, founded by Herbert Macaulay in 1925. For further details of the beginnings of newspaper production in Nigeria see p 217 below.

4 This claim is discussed further in Chapter Three below.

5 This emerges strongly from the collected opinions of Nigerian journalists, published in W.I. Ofonagoro, A. Ojo and A. Jinadu (eds.), The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/77, Lagos, 1977. This debate was largely concerned with the need for a stronger guarantee of media freedom, as further discussed below.

of its liberty[1]. As regards radio and television, Nigeria was also one of the first African states to introduce these media[2]; and now has twenty radio services (one for the Federation as a whole and one for each of its nineteen states[3]), whilst '/C/ountrywide colour /television/ coverage is now virtually complete'.[4]

As regards the law governing these media, Nigeria provides a highly instructive framework for study. Many of the relevant rules are of post-independence origin; but a considerable proportion derive from English legislation, common law and doctrines of equity: which apply within the country by virtue of her past history as a British dependency. Of these, the most significant by far are the common law rules: and these are an important subject of study for two principal reasons. First, they have developed in piecemeal fashion over time; and stand in considerable need of reform to meet the changed conditions of the modern world, as has been tacitly acknowledged in the United Kingdom itself through the recent establishment of various commissions

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1 Thus, for example, the Nigerian press protested vigorously against the maltreatment of one of its number, the journalist Amakiri; and has also compaigned vigorously against the establishment of a government-controlled Press Council, and the introduction of restrictions on the reporting of the elections to be held in August 1983. These illustrations are discussed further in Chapter Three below.

2 See the section on the growth of the Nigerian media below.

3 See The Times, (of London), Special Supplement on Nigeria, 3 February 1982. The process whereby the country has become divided into 19 states is further described below, in the section on the history of Nigeria.

4 The Times, ibid.

of inquiry[1]; and by the enactment of remedial legislation in one particularly troublesome sphere.[2] Secondly, these common law rules apply not only in Nigeria, but also in a great many other Commonwealth states whose legal systems are likewise, in large measure, the product of their British colonial past. In many of these states, as in Nigeria itself, however, little attention has been given to the need for reform of the law:[3] a circumstance readily understandable in the light of the development problems faced by many. It is submitted therefore that - although Nigeria's experience is clearly unique to her - it may nevertheless be instructive

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1 Thus, for example, as further described in the course of this study, commissions have been established to inquire into the law of defamation and contempt of court. Considerable concern has also been expressed in the United Kingdom at the need for new rules of privacy and freedom of information; whilst the law of obscenity continues to present great difficulty. Full analysis of the various studies made lies outside the scope of this dissertation, however: though those of particular importance (relating to defamation and contempt of court) will be further discussed in due course.

2 Thus, certain aspects of the common law offence of contempt of court have now been reformed and modified through the enactment of the Contempt of Court Act, 1981.

3 Thus, for example, in the context of contempt of court, it is apparent that the Commonwealth states have done little to reform the law: such amendment as has either been implemented (in Bermuda, through the Administration of Justice (Contempt of Court) Act, 1979) or recommended (in Canada and New Zealand, for example), being largely based on United Kingdom recommendations and leaving many problem areas untouched and unresolved. For additional details of these reforms, see the Memoranda of the 1980 Meeting of Commonwealth Law Ministers, published by the Commonwealth Secretariat, at pp 277-300. Further analysis of these proposals and amendments lies outside the scope of this study; but it is hoped to show the insufficiency of the United Kingdom recommendations (on which they are based) in the course of this dissertation.

for other Commonwealth jurisdictions as well to examine the difficulties which have arisen in the Nigerian context in the application of these laws: and to consider what reforms are required to strike a more appropriate balance between freedom and restriction.

In this regard, it is submitted that the United States of America provides a salutary contrast and example: for her law relating to freedom of the media is likewise of common law origin; and yet has been considerably modified (largely through decisions of the Supreme Court) to give freedom of expression a practical significance sadly lacking in many other common law jurisdictions. It is accordingly proposed to contrast various Nigerian laws governing the media with their counterparts in the United States: and - against this background - to review the constitutionality of Nigerian law (in terms of the guarantee of freedom of expression contained within the Nigerian Bill of Rights): and the need for reform of the law to bring it closer into line with the proclaimed ideal of freedom 'to receive and impart ideas and information without interference'.[1]

Before embarking on this analysis, however, some understanding of the country, its legal system and its media, is required; and it is accordingly proposed to devote the balance of this Chapter to brief description of Nigeria's

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[1] This is the right guaranteed by s 36, Constitution of the Federal Republic of Nigeria, 1979, discussed in further detail below.

socio-cultural framework, history, legal structure, and Bill of Rights: and to conclude by analysing the guarantee of freedom of expression (which provides the yardstick for assessing the constitutionality of the laws in issue); and by sketching the growth and present distribution of the media in the country.

## 2.2. Historical Socio-Cultural Divisions Within Nigeria

Modern Nigeria[1] incorporates within its boundaries (largely the arbitrary result of the "scramble for Africa" by the European powers during the nineteenth century) a multiplicity of different linguistic and ethnic groups, 'rang/ing/ in size from 5,000 to groups numbering more than five million.'[2] In broad outline, however, the population was divided, historically, into three major groups, each centred in a different part of the country, which it dominated to a considerable extent, at the cost of other ethnic groups within the area. Some analysis of this important tripartite division is thus necessary for a proper understanding - not only of the development of the modern state - but also of the forces at play in it today. The three major groups in question are, of course, the Hausa (in the North), the Yoruba (in the West) and the Ibo (centred in the East).

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1 The name 'Nigeria' was apparently coined by the Africa correspondent of The Times, Flora Shaw, who subsequently married the first governor-general, Lord Lugard. The first official recognition of the name appeared in the House of Commons Debate on the Royal Niger Company Bill in July 1897. See O.I. Odumosu, The Nigerian Constitution: History and Development, London, 1963, p 5, n 5.

2 Kalu Ezera, Constitutional Developments in Nigeria, Cambridge, 1964, p 2. For further details see also p 3, Table 1, where the population of Nigeria according to linguistic group is set out. There are 15 major groups, of which the most important are the Hausa, Yoruba and Ibo, as explained below. The latter tri-partite division is reflected in the three Regions into which the country was divided for many years: See Appendix I, Map A.

## 2.2.1. The Northern Hausa

The Hausa constitute the largest linguistic group, not only in the North but also in Nigeria as a whole[1]. The dry, open savannah of the Northern regions in which they live facilitated the early development of major cities and also exposed their communities 'to the penetration of Islam, .../which was/ carried... across the Sahara from the Mediterranean region';[2] and has had an immeasurable impact on their social and political institutions.[3] In character, the Hausa people have been described as conservative in outlook, disdainful of non-Muslims, and unquestionably obedient to authority,[4] with a strong sense of cultural identity and considerable skill in trading.[5] Their world is totally different - scenically and culturally - from the green south and, historically, was characterised by the incidence of:

> 'an apparently docile peasantry grouped around large, well-built cities of red clay, with their mosques, their law-courts and their palaces housing the Emirs - /all/ served by numerous officials, attendants and mailed horsemen'.[6]

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1 Ezera, supra, p 4.

2 Marjory Perham, 'Nigeria's Civil War', /1968-69/ Africa Contemporary Record, p 3.

3 T.O. Elias, Nigeria: The Development of its Laws and Constitution, London, 1967. Elias also submits, however, that, 'the indigenous Hausa States have retained much of their own characteristics'. (Note that Elias' work comprises Vol 14 in G.W. Keeton, ed., The British Commonwealth: The Development of its Laws and Constitutions).

4 Ezera, supra, pp 4-5.

5 Perham, supra.

6 Ibid.

## 2.2.2. The Western Yoruba

The Yoruba, the largest group in the West, were characterised first by their sophisticated political organisation and 'tradition of constitutional monarchy, with the Alafin of Oyo /and/ his council ruling a kingdom of more than a million people.'[1] Their second outstanding feature was their high degree of urbanisation - one of their cities (Ibadan) being 'one of the largest indigenous towns of negro Africa.'[2] Sophisticated city-dwellers, their '/t/rade and industry were highly developed: /and/ there were numerous crafts /and/ a highly complex religion'.[3] Their geographical situation - in drier and more open country than in the forested East[4] - exposed them to a modicum of Hausa influence[5] and also ensured that they were the first of Nigeria's inhabitants to come into contact with Europeans.[6] The latter factor (coupled with a keen interest in education and trade) quickly ennabled the Yoruba to play an active and leading role in the professional and commercial life of Nigeria.[7]

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1 Ezera, op cit, pp 6-7.
2 Pèrham, op cit, p 2.
3 Ibid.
4 See ibid.
5 See ibid.
6 See Ezera, supra, p 7.
7 See, ibid, pp 7-8.

## 2.2.3. The Eastern Ibo

The dense equatorial forests of the East moulded a very different form of society for the Ibos. Isolated from contact with the North and West - and even from much interaction with each other - the Ibo developed no equivalent large-scale, hierarchical political organisation. On the contrary, the 'largest political unit was normally the village group'[1]; and this perhaps contributed to both their egalitarianism and belief in open competition. Other characteristics of the Ibo have been described as their ready adaptability to new ideas, their industry, humour and vitality.[2] These factors - coupled with over-population and poverty in the East - contributed to their large-scale migration to other parts of the country; and, in the 1940s and '50's especially, the Ibo 'forged ahead... to become the most active and westernised group in Nigeria; and they streamed out of their poor and overcrowded land to employ their energies and their newly-gained skills and education in other parts of the Protectorate'.[3]

Further consideration of the complexities of socio-cultural divisions in traditional Nigerian society lies outside the

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1 Ibid, p 8.

2 See, ibid, pp 9-10, especially the quotation from John Gunther, Inside Africa, New York, 1955, p 760, reproduced at p 10.

3 Perham, op cit, p 3.

scope of this study[1]. The thumb-nail sketch[2] of the three major groups provided above is intended to serve primarily as a foundation for the following brief analysis of major developments in the history of Nigeria - from the inception of colonial rule in the nineteenth century - to the present day.

## 2.3. Outline of Nigerian History: From 1861 to Date

The evolution of modern Nigeria from the beginning of colonial rule in 1861[3] is perhaps best understood by focusing on key dates in its development.

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1 For further detail, see Ezera, op cit, pp 1-12, Elias, op cit, pp 1-4; T.O. Elias, The Nigerian Legal System, 2nd ed., London, 1963, pp 7-9, and B.O. Nwabueze, Machinery of Justice in Nigeria, London, 1963, pp 45-46 ; and see also Odumosu, op cit, pp 3-4, where the author points out that these divisions are by no means the only ones in Nigerian society and that the situation would be very much simpler if, in fact, it did comprise only three homogeneous groups. In reality, however, there are a number of other sizeable ethnic groups within each of these three regions. 'For example, in the /North/ there are the Kanuris, the Nupes, and the Tivs; in the /East/... the Ibiobios and the Efiks; /whilst/ /t/he West includes the Itsekiris, the Urhobos and the Ijaws'.

2 It is acknowledged that the picture of each group presented in the text above constitutes the barest outline. More detailed analysis does not, however, seem warranted in a study concerned mainly with laws of English origin and in relation to a country in which every effort is being made to submerge consciousness of ethnic differences in an overriding national unity.

3 As early as 1849, a British Consul had been appointed for the Bights of Benin and Biafra, but this did not entail any assertion of British jurisdiction over this area. See B.O. Nwabueze, Constitutional Law of the Nigerian Republic, London, 1964, at p 6.

## 2.3.1. 1861 - The Annexation of Lagos Colony

In 1861, prompted by concern that '"the permanent occupation of this important point in the Bight of Benin is indispensable to the suppression of the slave trade"',[1] Britain entered into a treaty with the ruler of Lagos[2] whereby 'absolute dominion and sovereignty' over 'the port and island of Lagos' were transferred to the Crown.[3] (In addition, a number of additional treaties were gradually concluded with various Yoruba rulers as Britain sought further to achieve its avowed aim of suppressing the slave trade).[4]

## 2.3.2. 1866 - The Incorporation of Lagos in the West African Settlements

This was effected pursuant to a recommendation of the Parliamentary Committee in 1865 that Britain's four West African colonies should be amalgamated 'to reduce United Kingdom responsibility for overseas territories'.[5] Accordingly,

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1 Papers relating to the occupation of Lagos, 1862, p 5, quoted in Odumosu, op cit, pp 5-6.

2 There appears to be some confusion as to the name of this ruler. Thus Odumosu, ibid, refers to him as 'Dosumu', whilst Nwabueze, supra, p 9 reflects his name as Docemo. Nwabueze's version (since derived from the treaty itself) is presumably correct.

3 For the full text of the vital Article 1 of this Treaty, see Nwabueze, ibid.

4 The terms of these treaties are described by Nwabueze, ibid pp 10-11. In general, jurisdiction over natives was not initially ceded; but this was effected by new agreements concluded in 1904.

5 Odumosu, op cit, p 6.

'in 1866 Lagos became part of the West African Settlements under a Governor-in-Chief stationed at Sierra Leone. In place of the Governor, Lagos had an administrator but retained its Legislative Council.'[1]

## 2.3.3. 1874 - 1886: Miscellaneous Developments

In 1874, 'a separate single government was established for the British settlements of Lagos and the Gold Coast both of which were together called the Gold Coast Colony'.[2] From 1885, the "scramble for Africa" intensified (following the Berlin Conference) and, in the same year, Britain, (having previously established a consulate in the area to the east of Lagos) proclaimed it a British protectorate.[3] Effective administration, however, was introduced only in 1891[4]; and in 1893, the 'protectorate was extended to include the hinterlands and renamed the "Niger Coast Protectorate".[5]

The next major development came in 1886, when Lagos Colony was separated from the Gold Coast, and was established as a separate colony, with its own governor, and councils (both legislative and executive)[6].

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1 Ibid.

2 A.O. Obilade, The Nigerian Legal System, London 1979, p 19.

3 Odumosu, supra, p 7. This was known as the Oil River Protectorate.

4 Ibid. Thus, 'Consuls and Vice-Consuls were /then/ appointed to the various rivers under a Commissioner and Consul-General resident at Calabar'.

5 Ibid.

6 Obilade, supra, p 20. See also Nwabueze, op cit, p 45.

## 2.3.4. 1900 - 1906: The Separate Protectorates of Southern and Northern Nigeria

Britain's claim to the Niger Basin having been accepted at the Berlin Conference of 1885, the Royal Niger Company obtained its Charter in 1886, with power to "administer, make treaties, levy customs and trade in all territories on the basin of the Niger and its affluents".[1] Exercising these powers, it gained - by treaty with traditional rulers - wide-ranging control over a large part of the North. Following criticism of the Company's 'combin/ing/ administrative powers with commercial monopoly'[2], its Charter was revoked in 1899 and its 'rights and administrative functions... were transferred to the Imperial Government'[3]. Accordingly,

> 'in 1900 the administration of the somewhat indefinite area on the Niger which had been under the Royal Niger Company was joined to the Niger Coast Protectorate[4] and the whole area was renamed the Protectorate of Southern Nigeria'.[5]

On the same date (1 January 1900), the remaining territories formerly under the control of the Company were constituted as the Protectorate of Northern Nigeria (with Sir Frederick Lugard[6]) as the first High Commissioner .[7] The vast hinterlands were brought under British control by conquest during

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1 Cited in Odumosu, op cit, pp 7-8.

2 Ibid, p 8 where the criticism of the Company is explained more fully.

3 Ibid.

4 The formation of this Protectorate is of course, described above.

5 Odumosu, supra, p 8.

6 Lugard was responsible for introducing 'Indirect rule', as further explained below, and had a great impact on the history of the country.

7 Odumoso, supra, p 9.

1902 to 1903 and incorporated within the Northern Protectorate.[1]

Finally, in 1906, 'the Colony and Protectorate of Lagos and the Protectorate of Southern Nigeria were amalgamated to form the Colony and Protectorate of Southern Nigeria.[2]

## 2.3.5. 1914 - The Establishment of the Colony and Protectorate of Nigeria

The merger of the Northern and Southern Protectorates into the Colony and Protectorate of Nigeria (which took place in 1914) was based upon the realisation that 'the total isolation of the North from the South could not continue indefinitely'.[3] The North was land-locked and poor, its revenues requiring annual supplement from the South (and hence the Imperial Treasury) and it was hoped that unification would relieve the latter from this burden as well as facilitate the development of communications.[4] Accordingly North and South were brought together in the Colony and Protectorate of Nigeria, which came into being on 1 January 1914.[5]

Legislative power was vested in the Legislative Council of

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1 Ibid, See also Sir Alan Burns, History of Nigeria, London, 1929, Chap. 15.

2 Obilade, op cit. p 24.

3 Odumosu, supra , p 10.

4 Odumosu, op cit, p 10.

5 Ibid. Thus modern Nigeria came into existence as a political unit only in the twentieth century, and less than fifty years before her attainment of independence in 1960.

Lagos[1] (whose powers were, however, confined to the Colony)[2] and in the Governor who was given power to make laws for the Protectorate.[3] In practice, however, laws were jointly rather than separately enacted for both areas.[4] In addition, a body with purely advisory functions, the Nigeria Council, was established for the whole country in order to canvass local opinion.[5]

Executive power was vested in the Governor and an Executive Council - this being the Executive Council previously established in the Lagos Colony[6] - the jurisdiction of which was now extended to the entire Protectorate.[7]

A three-tier court system was introduced for the country as a whole: this comprising the Supreme Court, the provincial courts and the native courts.[8]

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1 As explained above, this was introduced when Lagos again became a separate Colony on separation from the Gold Coast

2 This was because it was considered inequitable that a Council situated in the South should have power to make laws for the remote northern areas of the country, without adequate knowledge of the needs of these regions. See Nwabueze, op cit, citing a speech of the Governor-General, Sir Frederick Lugard, to this effect.

3 See Nwabueze, ibid, p 45.

4 Ibid , pp 45-46.

5 The Council was composed of 30 members and had an "official" majority of 17:13. For further details of its composition and powers, see Nwabueze, ibid, pp 46-47 and Odumosu, supra, p 13.

6 This was introduced in 1866 when Lagos again became a separate Colony, as explained above.

7 See Nwabueze, supra, p 47.

8 See Obilade, op cit, p 28. The present structure of the Nigerian Courts is described below.

The establishment of the Legislative and Executive Councils was significant in that they removed sole legislative and executive authority from the Governor. However, their impact, in practice, was minimal: as both consisted predominantly[1] or exclusively[2] of officials; and the consent of either body to measures proposed by the Governor was accordingly a 'mere formality'[3]. The courts in Nigeria were also 'subject to supervision by the Crown'[4] through a system of appeals to the Judicial Committee of the Privy Council.[5]

## 2.3.6. 1914 - 1920: The Rise of the West African National Congress

Educated Nigerians objected to this undemocratic system and voiced their dissatisfaction through the West African National Congress, which (in 1920) petitioned the colonial authorities in London for, inter alia, greater African participation in government and the strengthening of judicial independence.[6] Their request was rebuffed, however: the prevailing British response perhaps being summarised by Lord Lugard, who objected to the notion of the

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1 The composition of the Legislative Council varied from time to time, but the majority were always officials. See Odomuso, op cit, p 12; Nwabueze, op cit, p 48; and C.O. Okonkwo, Introduction to Nigerian Law, London, 1980, p 194.

2 The Executive Council consisted of the Governor and ten officials. See Okonkwo, ibid, p 197.

3 Nwabueze, supra, p 48. Nwabueze here is concerned with the Legislative Council specifically, but the same holds true for the Executive Council.

4 See Nwabueze, ibid, p 51.

5 See Nwabueze, ibid. Control was perhaps even more effectively exercised through the fact that those appointed to judicial posts were essentially colonial administrators.

6 See Odumosu, supra, pp 14-15.

'large native population' becoming subjected to the will 'either of a small European class or of a small minority of educated or Europeanised natives who have nothing in common with them, and whose interests are often opposed to theirs'.[1]

## 2.3.7. 1922 - The Clifford Constitution

The efforts of the West African National Congress may not have been entirely in vain, however, for 1922 saw the abolition of the existing Legislative and Nigerian Councils and their replacement by a new Legislative Council with increased unofficial representation[2] and four elected members.[3] Official members still held the majority, however,[4] Membership of the Executive Council remained exclusively official.[5]

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1 Ibid, pp 15-16.

2 The number of nominated non-officials varied in number from 13 to 17 (see Nwabueze, supra, p 48). At its inception, the number was 15. (See Odumosu, supra, p 23 and Okonkwo, supra, p 195). For subsequent slight variations in its composition, see Odumosu, ibid, p 25. For further details regarding its powers, see also Odumosu, ibid, pp 22-27.

3 Of the four elected members, three were elected from Lagos and one from Calabar on a franchise limited to adult British subjects or protected persons satisfying certain residence and income requirements. 'In the result out of an estimated population of 40,000 in Lagos and 10,000 in Calabar only 3,000 and 1,000 respectively qualified to exercise the franchise'. See Nwabueze, supra, p 49, citing Wheare, The Nigerian Legislative Council, (1949), p 56. For further details regarding the qualifications to vote and to stand for election, see Odumosu, supra p 23.

4 The number of officials was 27 (per Odumosu, ibid, p 23; and Okonkwo, supra, p 195) and 26 per Nwabueze, supra, p 48.

5 See Oknokwo, supra, p 197, who gives its composition as the Governor and nine officials.

For further information regarding the important new Legislative Council, see Nigeria (Legislative Council) Order in Council, 1922 (S.R. & O. 1922 No 1466).

## 2.3.8. 1922 - 1946: The Growth of Nigerian Nationalism

The holding of elections to the Legislative Council in Lagos and Calabar fuelled political consciousness and led to the emergence of a major political party - the Nigerian Democratic Party, which aimed (inter alia) at 'Africanisation of the civil service, educational development in Nigeria and fair treatment for native traders'.[1] Throughout its long history, the party did not, however, succeed in making its influence felt outside Lagos.[2] Of greater significance, accordingly, was the formation of the Nigerian Youth Movement, originally founded in 1933[3], concerned particularly with the encouragement of unity and national consciousness amongst Nigerians[4] and vocal on certain economic issues.[5] Although it declined steadily after 1941, it had great significance as the 'first Nigeria-wide multi-tribal political party in Nigeria'.[6]

Nigerian nationalism was further fostered by the country's participation in the Second World War. This generated resentment against government control over the economy, as well as

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1 Odumosu, op cit, p 29, who gives a relatively full account of the party and its significance.

2 Odumosu, ibid. He speculates that this may have reflected the determination of its founder - Herbert Macauley - to keep it under his control.

3 See Odumosu, ibid, p 30. At its inception, the party was called the Lagos Youth Movement.

4 See Odumosu, ibid, who describes some of the aims reflected in its "Nigerian Youth Charter".

5 In particular, the N.Y.M. protested against the "Cocoa Pool" monopoly in 1938. See Odumosu, ibid, p 31.

6 Odumosu, ibid.

rapid urbanisation, increased trades-union activity and a reservoir of skilled Nigerian ex-servicemen, highly confident of their ability to take charge of Nigeria's affairs.[1] The war years were also significant for their effect on British attitudes to the prolongation of colonial rule; and Britain's views were particularly influenced, inter alia, by United State's criticism (especially following the Atlantic Charter) - and by 'the opposition to Empire expressed by the British Labour Party'.[2]

These factors, coupled with a perception of the need for constitutional reform on the part of the war-time Governor of Nigeria, Sir Bernard Boudillon,[3] resulted in the adoption of the Richards Constitution[4] in which - for the first time in Nigerian history - unofficials held the majority.

## 2.3.9. 1946 - The Richards Constitution

A new Nigerian Legislative Council was established, with

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1 For further details regarding these factors, see Odumosu, ibid, pp 37-40.

2 See Odumosu, ibid, pp 33-35.

3 See Odumosu, ibid, p 41. Bourdillon was concerned at the frustration inevitably engendered in the non-official members of the Legislative Council by the official majority; but was also aware of the dangers posed by allowing an unofficial majority to become coupled with an 'irremovable' executive; for this would represent 'that political anathema, power without responsibility'. (Bernard Bourdillon, "Nigeria's New Constitution"; United Empire, March - April, 1946, p 78, cited by Odumosu, p 41).

4 So called after Sir Arthur Richards, the then Governor of Nigeria.
Certain key innovations are described in the text below; but, for further information, see Nigeria (Legislative Council) Order in Council, 1946 (S.R. & O. 1946 No 1370).

power to enact laws for the entire country[1] and composed of the Governor, as President, 16 officials and 28 unofficials (24 nominated and 4 elected[2]). The Governor, however, reserved 'the power to veto legislation initiated otherwise than with his previous approval'.[3]

Regional legislatures were created for the first time in the North[4], West[5] and East[6] with, broadly speaking , a narrow unofficial majority in each[7] and 18 of the unofficial members of the central Legislative Council were nominated by these regional legislatures.[8] A significant percentage of the members of each Regional House of Assembly was

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1 The 1922 Constitution had not changed the position (established in 1914 on the amalgamation of North and South) whereby the Legislative Council had power to legislate for Lagos Colony alone, the Protectorate remaining subject to the legislative authority of the Governor as described above.

2 Provisions regarding the elected members from Lagos and Calabar remained essentially the same, save for a slight reduction in the income requirement for the franchise. See Nwabueze, op cit, p 53.

3 Nwabueze, ibid.

4 The North had two chambers - the House of Chiefs and the House of Assembly. For details of its composition, see Nwabueze, ibid, and Odomosu, op cit, p 44.

5 The West had a single chamber - the Western House of Assembly. For details of its composition, see Nwabueze, ibid, and Odomuso, ibid.

6 The East had also a single chamber - the Eastern House of Assembly. For details of its composition, see also Nwabueze, ibid and Odomuso, ibid.

7 For details, see Nwabueze, ibid, p 53. The unofficial majority in the Northern House of Assembly was 2; whilst in the Western and Eastern Houses it was 1, respectively.

8 See Nwabueze, ibid. 4 were nominated by the House of Chiefs from amongst its members; and 5, 4 and 5 respectively by the unofficial members of the Northern, Western and Eastern Houses of Assembly from among their numbers.

selected by native authorities[1], pursuant to the ostensible aim of forging a link between the latter and the central legislature.[2] The Regional Councils had no independent legislative power, but were entitled to make recommendations regarding proposed enactments, including the annual Appropriation Bill[3].

The Executive Council remained as before in composition[4] and function and 'had no effective connection with the Legislative Council since none of the unofficial Executive Councillors was a member of the Legislative Council.'[5]

The Richards Constitution was intended[6] to meet three goals: first, "to promote the unity of Nigeria" (hence the new

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1 See Odumosu, supra, p 44. In the North, 14-18 members of the House of Assembly were selected by native authorities from among their own members; in the West, 7-11 were selected by native authorities; and in the East, 10-13. This was out of total unofficial membership of 20-24, 15-19 and 15-18, respectively.

2 See Odumosu, ibid, p 45 who describes this as the 'primary aim' of the Regional Assemblies. If the nationalists were correct in their contention that the native authorities could usually be counted upon to support the Imperial government (as described below) the true motive may have been somewhat different.

3 See Nwabueze, supra, p 54.

4 See Nwabueze, ibid, p 56.

5 Odumosu, supra, p 48.

6 See the Governor's dispatch to the Secretary of State dated December 6, 1944, quoted by Odumosu, op cit, p 43.

Legislative Council with membership and jurisdiction extended to all parts of the country); secondly, "to provide adequately within that unity for the diverse elements which make up the country" (hence the establishment of the Regional Assemblies to take account of the wide differences in custom and outlook between the North, West and East); and thirdly "to secure greater participation by Africans in the discussion [and management[1]] of their affairs"[2] - (hence both the additional fora provided by the Regional Assemblies and the introduction of unofficial majorities).

Whether the Constitution succeeded in fulfilling these aims is a moot point. It was strongly criticised by the newly emergent National Council of Nigeria and the Cameroons,[3] formed in 1944 'to work in unity for the realisation of /the/ ultimate goal of self-government within the British Empire'[4] and 'the only country-wide political party at the time the Richards Constitution was introduced'.[5] Objection was voiced, in particular, to the absence of any form of ministerial responsibility for Nigerians[6], to the composition

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1 This word was apparently added to the constitutional proposals after objection by Nigerian nationalists, notably H.O. Davies, that Africans were to be allowed no more than to discuss. See Odumosu, ibid, pp 50-51.

2 See Odumosu, ibid, p 43, where these 3 goals are quoted.

3 This was commonly known as the N.C.N.C.. It should be explained that in 1924, part of the Cameroons was entrusted to Britain under the League of Nations Trusteeship system and was administered as an integral part of Nigeria for a considerable time. See Odumosu, ibid, p 27, as well as his further references to the fate of this territory - examination of which falls outside the scope of this study.

4 See Odumosu, ibid, p 49.

5 Ibid.

6 Ibid, at p 50.

of the unofficial membership[1] (especially 'the designation of chiefs as "unofficials"'[2]), and to the limited provisions for election to the Legislative Council[3]. The N.C.N.C., organised a protest tour of the country[4] (more successful in the East than elsewhere[5]) and, in 1947, sent a delegation to London to demand fundamental constitutional changes.[6]

Following the appointment of a new Governor (Sir John Macpherson) in 1948 and in response[7] to these nationalist objections, a comprehensive review[8] of existing constitutional

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1 The nationalists pointed out how small were the unofficial majorities and submitted that, given the number of unofficials nominated by the Governor himself, 'government measures could always expect a majority support'. See Odumosu, ibid, p 51.

2 'It was contended that since the chiefs and emirs owed their positions to the government under the indirect rule system, they should be correctly described as "officials"'. See Odumosu, ibid, p 51 (who explains the "indirect rule" system at pp 9 and 11).

3 See Odumosu, ibid, p 52.

4 Protest was voiced not only against the Constitution, but also against proposed legislation whereby the government sought to declare its title to all Nigerian minerals. For further details regarding these Ordinances, see Odumosu, ibid, pp 53-54.

5 Thus, notwithstanding its country-wide support, it seems that the N.C.N.C. was already becoming identified with the East. The significance of this is further examined below, but - in essence - it presages the difficulty experienced by the three major ethnic groups in submerging their own partisan interests in the larger concerns of Nigeria as a whole.

6 See Odumosu, supra, p 55.

7 See Odumosu, op cit, p 56.

8 The new Governor was, apparently, determined not to repeat his predecessor's mistakes and took pains to canvass as fully as possible all shades of Nigerian opinion on constitutional reform. See Odumosu, ibid, pp 56-57.

arrangements was launched. A Select Committee of the Legislative Council was established[1]; regional recommendations were obtained[2] and submitted to a drafting committee[3] which prepared a Draft Constitution for consideration by a General Conference[4], whose recommendations, accompanied by four minority reports[5], were ultimately approved by the Legislative Council and the Regional Legislatures[6] and submitted to the Governor, who, in turn, forwarded them to the Secretary of State.[7] These recommendations, with some modification[8] were accepted by him; and formed the basis for the promulgation of the Macpherson Constitution[9]; which constituted a major advance on the road to representative and responsible government.

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1 See Odumosu, ibid, p 57.

2 Ibid, pp 57-58.

3 Ibid, p 58.

4 Ibid, pp 59-62, and pp 64-65.

5 Ibid, pp 62-63. Particularly interesting are the minority recommendations for the division of Nigeria (not into three Regions) but into a number of states based on ethnic groupings; and for the introduction of universal (rather than male) adult suffrage.

6 See Odumosu, ibid, p 62.

7 Ibid, p 63.

8 These are described below.

9 So called after the then Governor of Nigeria, and adopted under the Nigeria (Constitution) Order in Council, 1951, S.I. No. 1172 of 1951.

## 2.3.10. 1951 - The Macpherson Constitution

One major innovation of this constitution was the introduction of elected majorities in both the regional and the central legislatures. With the exception of the Northern and Western[1] Houses of Chiefs (composed primarily, as their name suggests, of chiefs[2]), representative members (elected on general adult male suffrage[3] under a complex system of direct and indirect elections[4]) formed large majorities in each of the Regional Houses of Assembly[5]) as well as in the central legislature, now termed the House of Representatives.[6]

Federalism was strengthened by giving the regional legislatures power to legislate on specified subjects[7] but this power was not exclusive[8] and all regional legislation

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1 This was another change, the Western Region having had only one chamber in the past.

2 For details of their composition, see Odumosu, supra, p 68.

3 Subject to certain qualifications, such as residence, income, and due payment of tax.

4 For details, see Odumosu, supra, pp 66-69 and Nwabueze, op cit, pp 57-60. The latter summarises the position graphically by stating that 'the Nigerian voter was under the 1951 Constitution separated from his legislator by two removes in the East, three in the West and five in the North' (p 59) and he submits (citing Mackenzie, Free Elections, 1958, p 47) that '/e/lections of this kind... have "perhaps more to do with political education than with political power"'.

5 For details of their composition, see Odumosu, supra, pp 68-69, and Nwabueze, supra, p 57 who points out that the ratio of elected to non-elected members in the North was 90:14; in the West 80:7; and in the East 80:8.

6 For details of its composition, see Nwabueze, op cit, p 60. Here the ratio of elected to non-elected members was 136:13.

7 See Odumosu, op cit, p 66, for illustrations.

8 See Odumosu, ibid, who points out that the 'centre could legislate on all subjects including those on the Regional list'. See also his detailed analysis of Regional powers at pp 78-81, on the basis of which he concludes that the Macpherson Constitution, despite federal elements, was essentially unitary by virtue of the powers it concentrated at the centre.

required the consent of the central Executive Council before it could be sent to the Lieutenant-Governor of that Region for his assent.[1]

Some progress towards responsible government was made in that the autocratic executive power of the Governor was superceded by Executive Councils (Central and Regional)[2] in which representative members (styled Ministers), elected by secret ballot by the central and regional legislatures respectively[3], held the majority[4]. Furthermore, 'the appropriate House might also, by resolution supported by the votes of two-thirds majority of its members taken by secret ballot, request... /the revocation of/ a Minister's appointment'[5] and such request had obligatory effect.[6]

Executive Council decisions were taken by majority vote, the Governor (or Lieutenant-Governor in the case of the Regional

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1 See Odumosu, ibid, p 66.

2 See Nwabueze, supra, p 61.

3 See Nwabueze, ibid. The appointment was formally made by the Governor (or Lieutenant-Governor) but required the prior approval of the appropriate Assembly by resolution adopted by secret ballot.

4 For details of the composition of the various Executive Councils, see Nwabueze, ibid. The ratio of officials to representative members was 6:9 in the Regions, and 7:12 at the Centre.

5 Nwabueze, ibid, The 'two-thirds' requirement reflected the modification to the General Conference recommendations suggested by the Secretary of State. See above, and Odumosu, supra, p 64. This provision came into prominence in the subsequent Eastern Regions crisis, further described below.

6 See Nwabueze, supra, p 61. Ministers could also be dismissed for failing to carry out any policy or decision of their Executive Council.

Executive Councils) having only a casting vote[1]. The Governor (and Lieutenant-Governors) were in general enjoined to act on the advice of the Executive Councils,[2] but nevertheless enjoyed certain overriding powers to disregard their advice if 'expedient in the interests of public order, public faith and good government'.[3]

1951 was significant not only for the introduction of this constitution, but also because it marked the birth and the resurgence of two[4] political parties which - together with the N.C.N.C., (previously discussed above) - were to play a dominant role in Nigerian politics and whose rivalry was to tear the country apart in the years following independence.[5] The first was the Action Group (A.G.) which was founded in 1951 'with the specific objective of capturing power in the Western Region under the electoral system of the new Constitution'[6]. It was led by Chief Obafemi Awolowo (a Yoruba) and its aims included the strengthening of 'ethnical organisations in the Western Region' [7] and the exploration of possibilities for co-operation with other nationalists so as to 'work as a united team towards the realisation of

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1 See Nwabueze, ibid.

2 Ibid, p 62.

3 Nwabueze, op cit, p 64. It should, be noted, however that this was only one of a number of limitations on the powers of the legislative and executive councils. For further details regarding these, see Nwabueze, ibid, pp 62-65.

4 See Odomuso, op cit, p 67; also the text seq.

5 This was particularly evident in the 1962 Western Region crisis as well as in the elections of 1964 and 1965 as further explained below.

6 Odumosu, supra, p 66.

7 Ibid.

immediate self-government for Nigeria'[1]. Notwithstanding the latter goal, however, the A.G's election campaign 'was hostile to Dr. Azikiwe (an Ibo) /and/... emphasised the threat of Ibo domination under a unitary system of government'.[2]

The second party was the Northern People's Congress (N.P.C.) which had been formed in 1949 '"to save the North for the Northerners"'; and in response to fears of domination by the more developed South. It became moribund to some extent after its formation, but - following the surprise victory of a rival radical party in the earlier part of the election of 1951 - the N.P.C. was 'hastily revived to fight the elections';[3] and succeeded in winning all the seats.[4]

The elections in the Western Region were won by the A.G. (with the N.C.N.C. in opposition); and those in the East by the N.C.N.C. (which faced a 'rather weak opposition made up of the eight members of the United National Party'[5]).

These results marked the beginning of party politics dominated by ethnic and regional rivalries. The N.P.C. reflected the conservative Hausa, the A.G. the Yoruba and the N.C.N.C. the Ibo - and all had great difficulty in putting traditional differences behind them in the interests of Nigerian unity.

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1 Ibid.
2 Ibid, p 67.
3 Ibid.
4 Ibid, p 70.
5 Ibid. This party lacked the stature of the 'Big Three'.

The dangers of this division became increasingly apparent in the years before and after independence. The crisis in the Eastern Region in 1953[1] in which Ministers elected by the N.C.N.C. majority in the Eastern House of Assembly lost the confidence of the House but refused to resign[2] cast a shadow over the operation of the 1951 Constitution. The position was exacerbated by a motion tabled in the House of Representatives in March 1953, calling for "self-government in 1956"[3] - a proposal bitterly resented by Northern representatives who feared that early independence would lock the North into perpetual subordination to the more developed South. Riots in Kano increased North-South tension[4] and the Colonial Secretary thereupon reported to the House of Commons that 'Her Majesty's Government... consider that the /Nigerian/ Constitution will have to be redrawn to provide for greater regional autonomy and for the removal of powers of intervention by the Centre in matters which can, without detriment to other Regions, be placed entirely within regional competence'.[5]

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1 For a full account of this, see Odomuso, op cit, pp 82-88; and for its general outline, see Nwabueze, ibid, pp 62-63.

2 Thus earning for themselves the name 'the sit-tight Ministers': (see Nwabueze, ibid, p 63). The Lieutenant-Governor refused to dismiss them on the motion of 'no confidence' passed in the Eastern House of Assembly by 60 votes to 13, as voting had not been by secret ballot as required by the Constitution, but by a show of hands. The N.C.N.C. members of the Assembly retaliated by using its majority to defeat every government measure introduced in the House, with the result that the Lieutenant-Governor was eventually compelled to use his residuary legislative powers to enact the Appropriation Bill. See Odomuso and Nwabueze, ibid.

3 For a full account of this crisis 'at the Centre', see Odumosu, ibid, pp 88-90.

4 See Odumosu, ibid, p 90.

5 House of Commons Debates, Vol. 515, cols, 2263-2264 (May 1953), (cited by Odumosu, ibid, p 91).

A Constitutional Conference was accordingly convened in London in 1953[1] and continued its deliberations in Lagos[2]; and the result of this was the enactment of a new constitution in 1954[3].

## 2.3.11. 1954 - The Constitution of the Federation of Nigeria

The major innovation of this constitution was the increase in regional powers, in accordance with the policy announced by the Colonial Secretary.[4] Regional legislation no longer required the approval of the central executive;[5] and residual legislative powers were conferred on the Regional Assemblies.[6]. Certain matters, however, (reflected in the Exclusive List[7]) were placed under the exclusive law-making competence of the central legislature of the Federation, whilst others were reserved for the concurrent jurisdiction of both regional and federal legislatures, subject to the condition that - in the event of conflict - the latter should prevail.[8] In line with the increased responsibilities assigned to the Regions[9], Lieutenant-Governors were re-styled

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1 For a full account of the deliberations of the London Conference, see Odumosu, ibid, pp 92-101.

2 For a review of the Lagos Conference, see Odumosu, ibid, pp 102-108.

3 This was contained in the Nigeria (Constitution) Order in Council, 1954, S.I. No. 1146 of 1954.

4 As reflected in the text above.

5 See Odumosu, ibid, p 95.

6 See Odumosu, op cit, p 95.

7 See Part I of First Schedule to the 1954 Order in Council, supra

8 These matters were reflected in the Concurrent List, as to which see Part II of the First Schedule, ibid. Federal supremacy in the event of a conflict was provided by s 58, ibid.

9 These increased powers, of course, had the effect of converting Nigeria into a true federation, in which the units enjoy certain powers to the exclusion of the centre. See Odumosu, supra, p 81; and compare the power of the Regions in 1954 with that conferred on them by the 1951 Constitution.

'Governors', with a Governor-General for the whole Federation.[1]

The number of elected members to the central legislature was increased to 184[2] and ex-officio members were reduced to three[3]. All official members were withdrawn from the Eastern and Western Houses of Assembly[4]. Separate elections to the federal and regional legislatures were provided for.[5]

The number of official members of the regional and federal executive councils was also reduced,[6] but the major innovation in this sphere lay in the further progress made towards responsible government. Provision was made 'for the appointment in the Regions of an elected Minister as Chief Minister with the title of Premier /and/ /t/he Governor was to appoint as Premier a member of the House of Assembly who appeared to him to be the leader of the party commanding a majority in that House'[7]. Once appointed, the Premier could be removed by the Governor 'only if it appeared that he no longer enjoyed the confidence of that majority.'[8] 'Central Ministers were to be appointed from the body of

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1 See Odumosu, ibid, p 95.

2 See Odumosu, ibid. Recommendations for a bicameral federal legislature were rejected at this stage, as explained by Odumosu.

3 These were the Chief Secretary, the Financial Secretary and the Attorney-General: see Odumosu, ibid, p 96.

4 See Nwabueze, op cit, p 66.

5 See Odumosu, supra, p 96.

6 See Nwabueze, supra , p 69. All official members disappeared in the West and East, while a limited number were retained in the North and at the Centre.

7 Nwabueze, ibid, p 70.

8 Ibid.

the Federal legislature by the Governor-General ... on the recommendation of the leader in that House of a party having an overall majority'[1] and 'confirmation by affirmative vote of the legislature was dispensed with'.[2] In addition, Ministers were given 'direct and general control over departments within their portfolios,... at /both/ the centre /and/... in the Regions'.[3]

Nigeria was still far from independence, however, as a number of reserve and discretionary powers were retained by the Governor-General and Regional Governors.[4]

In the Federal elections under the 1954 Constitution, the N.C.N.C., attained a majority in both Eastern and Western Regional Assemblies.[5] In the North, the N.P.C. won an overwhelming majority and since fifty percent of seats in the central House were allocated to the Northern Region[6], it thus, by sheer numbers, controlled the House of Representatives.[7]

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1 Odumosu, op cit, p 96. In the absence of such a party, the appointment was to be made 'on the recommendation of the leader in that House of the majority party in the House from each Region'.

2 Odumosu, ibid.

3 Odumosu, ibid, pp 96-97. This was a significant advance from their previous position in which they had merely enjoyed authority over certain matters but were unable to control civil service department heads. See Odumosu, ibid, p 82.

4 See Odumosu, ibid, pp 99-101.

5 Ibid, p 108.

6 See Odumosu, pp 58, 61 and 65. During the review preceding the adoption of the Macpherson Constitution, the North had insisted on parity of representation (at the centre) with the West and East; and in the face of total Northern intransigence on the point, the Legislative Council (on 16 September 1950) had accepted this.

7 See Odumosu, ibid, p 108.

The N.P.C. and N.C.N.C. formed a coalition government[1], reflecting less a unity of viewpoint than a determination to neutralise Lagos[2] and 'for the first time a Parliamentary Opposition appeared in the Federal House'[3], this comprising the A.G. and the few U.N.I.P. members[4].

In response to continued pressure for full independence,[5] a further Constitutional Conference was convened in London in 1957, at which further important advances towards self-government were made.[6]

## 2.3.12. 1957 - Full Internal Self-Government in the West and East

The London Conference of 1957 recommended a fundamental change in the structure of the federal legislature, through the

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1 Thus resolving the difficult question (on which the 1954 Constitution provided little guidance) as to whether the N.C.N.C. could nominate central Ministers in a House controlled by the N.P.C. The agreement reached was that the N.P.C. would nominate three, and the N.C.N.C. six, (three from the West and three from the East).

2 See Odumosu, ibid.

3 Ibid.

4 Ibid.

5 This culminated in a motion, unanimously passed, by the Federal House, calling for independence for Nigeria by 1959. This motion was passed on 26 March, 1957 - at which point, preparations for the next constitutional conference were already well under way.

6 These were reflected in the Nigeria (Constitution) (Amendment) Order in Council, 1957, S.I. No. 1363 of 1957.

introduction of a second chamber, the Senate[1], with power to delay the passing of Bills (other than money Bills) by a maximum of six months.[2] The membership of the House of Representatives was increased to 320[3], with universal adult suffrage in the West and East, and the continuation of male suffrage only in the North[4].

The office of Prime Minister of the Federation was created, the Governor-General being empowered to appoint to this post 'the person who appeared to him to command a majority in the House of Representatives'.[5] Ministers were to hold office at the discretion of the Prime Minister and automatically vacated their posts on his resignation.[6] The Governor-General continued to preside over the central Executive Council and remained responsible for defence and the conduct of any external relations entrusted to Nigeria by the United Kingdom.[7]

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1 See Odumosu, op cit, p 116. The London Conference also recommended the creation of an Upper House in the Eastern Region, notwithstanding the difficulties entailed - especially the absence of traditional chiefs in the area. See Odumosu, ibid, pp 114-115.

2 See Odumosu, ibid, p 117.

3 Ibid.

4 Ibid. For further details of changes in franchise requirements over the years, see Nwabueze, op cit, pp 66-68.

5 See Odumosu, supra, p 118.

6 Ibid. The three former official members (as described above) thus no longer sat in the central Executive Council.

7 Ibid. For further details regarding the powers reserved to the Governor-General from 1954 to independence, see Nwabueze, supra, pp 70-76.

Internal self-government was conferred on the Eastern and Western Regions in 1957 - the North preferring to wait in this regard until 1959[1]. In response to a demand for the creation of more states[2] (prompted by minority fears of oppression by the majorities in each of the Regions) a Commission of Inquiry was established to examine minority fears and recommend appropriate safeguards.[3]

Alhadji Abubakar Tafawa Balewa was appointed to the office of Prime Minister[4]; and he, in August 1957, was responsible for the formation of a National Government[5] aimed at leading the country to independence by April 1960[6].

## 2.3.13. 1958 - A Further Constitutional Conference and the Minorities Commission Report

A number of important decisions were taken at the 1958 Constitutional Conference. The Northern Region was to attain full internal self-government in March 1959[7]; elaborate provisions for changing regional boundaries and creating

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1 See Odumosu, supra.

2 Ibid, p 115.

3 Only as a last resort, however, was the creation of new states to be recommended. See Odumosu, op cit p 115-116. The Commission's terms of reference and its recommendations are discussed in further detail below. These were of vital importance for the introduction of the Bill of Rights with its guarantee of freedom of expression.

4 See Odumosu, ibid, p 122.

5 See Odumosu, ibid. Since the two main political parties were already in coalition, (as explained above), the only party to be brought in was the Action Group.

6 See Odumosu, ibid. This date had been suggested by the Nigerian delegation to the 1957 Constitutional Conference. See, ibid, p 119.

7 See Odumosu, ibid, p 124. This reflected a considerable change of heart on the part of the Northern leaders, who apparently feared their conservative stance might result in loss of support for the N.P.C.

new regions were formulated[1]; the composition of the Eastern House of Chiefs was agreed[2]; rules for constitutional amendment after independence were devised[3] and it was accepted by the Colonial Secretary, on behalf of Her Majesty's Government, that Nigeria should attain full independence on 1 October 1960.[4]

The Minorities Commission reported[5] the extent of minority fears of possible oppression following independence and recommended, inter alia, the adoption of a comprehensive Bill of Rights[6] to protect all individuals. It considered the creation of new states unwarranted.[7] Some Nigerian delegates were unwilling to accept the latter view; and the Colonial Secretary warned that the creation of new states would inevitably delay the grant of independence[8].

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1 These complex provisions are described in detail by Odumosu, ibid, pp 127-128. They were designed to ensure maximum agreement for the creation of new regions, especially by those in the area concerned.

2 See Odumosu, ibid, pp 129-130.

3 Ibid, p 130.

4 Ibid, pp 131-132.

5 Report of the Minorities Commission, Cmnd. 505, 1958.

6 Modelled on the European Convention of Human Rights, 1950.

7 This is hardly surprising, given its terms of reference, as further explained in the section on the Bill of Rights below.

8 See Odumosu, supra, p 126. The final decision reached - to incorporate a Bill of Rights - is discussed further below. This development is of great significance for this study, as the Bill of Rights contains a guarantee of freedom of expression which has important ramifications for the laws in Nigeria governing media freedom.

## 2.3.14. 1959 - The Adoption of a Bill of Rights and Miscellaneous Other Developments

The Northern Region achieved full internal self-government on 15 March 1959[1]; a Bill of Rights was incorporated within the Constitution, pursuant to the Minorities Commission Report[2]; and Federal elections[3] (to choose a government for the next five years[4]) were held in December 1959. No single party obtained a majority; and the N.P.C. and N.C.N.C. formed a coalition government, with the A.G. in official opposition.[5]

## 2.3.15. 1960 - The Attainment of Independence

Following a final Constitutional Conference in London in May 1960, Nigeria attained independence on 1 October 1960, by virtue of the Nigeria Independence Act of 1960[6]. The independence constitution (under which Her Majesty remained Head of State, but was represented by a Governor-General) was contained in the Nigeria (Constitution) Order in Council, 1960[7]. The country also became a member of the Commonwealth.

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1 See Odumoso, op cit , p 124.

2 See p 91 above. The vital Bill of Rights is discussed further at p 170 below.

3 This was to the enlarged House of Representatives. See Odumosu, supra, p 132. (The Senate had been created in 1958).

4 The last federal elections had thus been held in 1954; and the next were scheduled for 1964.

5 See Odumosu, ibid, p 132.

6 8 & 9 Eliz. 2, c 55.

7 S.I. No. 1652 of 1960. For details of the provisions of the Constitution (other than Chapter III, on Fundamental Rights, discussed below), see Nwabueze, op cit, especially Chapters Four to Eight; and Odumosu, supra, especially Chapters Four to Six.

## 2.3.16. 1962 - The Western Region Crisis

Following the election of Chief Awolowo (the leader of the A.G.) to the federal legislature in 1959[1], his deputy within the party - Chief Akintola - became premier in the Western Region.[2] Subsequently, however, Chief Akintola was deposed from the deputy leadership of the party; and 66 A.G. members of the Western House of Assembly then wrote to the Regional Governor stating that they had lost confidence in Chief Akintola and asking the governor to remove him from the premiership.[3] The governor[4] did so and appointed Chief Adegbenro (the new deputy leader of the A.G.) as premier in his place. Chief Akintola refused to accept his dismissal and took up his normal place in the House of Assembly when it convened to approve the new government.[5] An uproar ensued in the House, which was ultimately cleared and locked by the police.[6] The federal government thereupon declared

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1 See B.O. Nwabueze, Constitutionalism in the Emergent States, London, 1973, p 133.

2 Ibid.

3 Ibid.

4 The Governor was the Oni of Ife, and had previously attempted to effect a reconciliation between the two factions. See Odumosu, op cit, p 277. It is suggested by Odumosu, (see p 304) that to some extent his position as a leading Yoruba Oba was incompatible with his role as Governor and led him to assume too active an involvement in these internal party differences.

5 See Odumosu, ibid, p 278. It should be noted that there was some doubt as to the legitimacy of the Governor's action under section 33(10) of the Constitution of Western Nigeria (under which the Governor had purported to dismiss him) as it was contended that a motion of no confidence should have been passed on the floor of the House in order to show that he 'no longer command/ed/ the support of a majority of the members of the House of Assembly'. Ultimately, however, the legitimacy of the dismissal was confirmed by the Privy Council: see Adegbenro v Akintola and another /1966/ 3 W.L.R.63.

6 See Nwabueze, op cit, above, p 133.

a state of emergency in the Western Region and assumed administration of the area under emergency powers.[1] This sequence of events - though constitutionally legitimate[2] - had profound repercussions on the future of Nigeria; for '/i/t... opened the region to the floodgates of political unrest and violence, which culminated in the debacle of 1965-66'.[3]

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1 After the Federal Government took control, 'immense defalcations of regional revenues into party funds and private hands were revealed. Awolowo was tried for treason and imprisoned with Enahoro (the celebrated fugitive offender), and his rival restored to power in alliance with the northern party in a bitterly divided region.' See Perham, op cit, p 5.

2 The Privy Council (overturning the prior decision of the Nigerian Supreme Court) held that the Governor did have power to dismiss Chief Akintola in the circumstances: see Adegbenro v Akintola and another, supra, and the Nigerian Supreme Court indicated, whilst not expressly ruling on the point, in Williams v Majekodunmi, /1962/ 1 All N.L.R. 324 and Adegbenro v The Prime Minister and Attorney-General of the Federation /1962/ 2 all N.L.R. 338, that the declaration of emergency was indeed constitutional and that the need for such a declaration was a matter for Parliament, not the courts, to decide. See Elias, Nigeria: Development of its Laws and Constition, supra, p 287.

3 Nwabueze, supra, p 133. For a full account of the crisis, see Odumosu, supra, Chapter Nine. See also Nwabueze, supra, pp 132-133, who suggests that the federal government used the internal party dissension as a convenient excuse for breaking the power of the A.G. which had been vigorously campaigning for the creation of more states (particularly a Middle Belt State in Tivland and a new state in the East) which - if brought into being - would have threatened 'Northern hegemony'.

## 2.3.17. 1963 - Transition to Republican Status

On the third anniversary of Nigeria's independence, the link with the British monarchy was severed and Nigeria became a republic,[1] but remained a member of the Commonwealth[2]. The constitutional changes effected were minimal, the functions previously exercisable by the Queen (through the Governor-General) devolving instead upon a new titular head of state - the President.[3] In addition, judicial service commissions were abolished[4] and so too was the right of appeal to the Judicial Committee of the Privy Council.[5]

A further important change effected in 1963 was the creation of the Mid-Western Region[6] out of the Western Region, pursuant to pressure which had been mounting in this regard since 1955.[7]

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1 See Nwabueze, Constitutional Law of the Nigerian Republic, supra, p 85; and Nigeria Republic Act, 1963 (1963 c. 57).

2 Ibid, p 96.

3 For details of these changes, see Nwabueze, ibid, pp 85-89.

4 The significance of these Commissions is discussed further below, in relation to the independence of the judiciary, in the section on the Nigerian Bill of Rights below.

5 This is discussed further in relation to the Sources of Nigerian Law, below.

6 See Nwabueze, supra, p 130. For a discussion of the difficulties attendant upon its formation, see Nwabueze, ibid, pp 429-434.

7 See Nwabueze, ibid, p 130. 'A motion for the creation of the state had in June 1955 been passed unanimously by the Western House of Assembly and in 1961 by the Federal House of Representatives'. The underlying reason is further explained by L.S. Wiseberg, 'Humanitarian Intervention: Lessons from the Nigerian Civil War', (1974) 7 Revue des Droits de L'Homme, pp 61-98, at p 63, on the basis that 'The Yoruba, weakened by inter-regional conflict, were unable to resist the demands of their Edo minority for their own state'. He further points out that 'with a large Igbo population and the NCNC in power, the Mid-West was, in many respects, a protege of the East'.

## 2.3.18. 1964 - 1965: Federal and Western Region Elections

The first federal elections since independence and the subsequent Western Region elections were characterised by electoral malpractices of a proportion 'perhaps unequalled anywhere else in the world'[1]. The stage for this had been set partly by the 1962 census controversy,[2] partly by the earlier Western Region crisis[3]; and primarily, perhaps, by the factor underlying both these events: the North-South rivalry which had bedevilled the country since its creation. The elections were contested by two alliances - the N.N.A.[4] and U.P.G.A.[5]. The latter complained that it was precluded from campaigning in the North[6] and therefore boycotted the elections; and this resulted in an overwhelming victory for the N.P.C. in the North and for its ally, the N.N.D.P. in the West.[7] The U.P.G.A. was then persuaded, 'to accept a further opportunity to vote early in 1965, which gave them about half the number of seats held by their opponents'.[8]

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1 Nwabueze, Constitutionalism in the Emergent States, supra, p 148

2 See Perham, op cit, p 5, who explains that, shortly after independence, it became 'dangerously clear that control of the federal centre and its finances would fall to the... region with the majority of members;' and that 'the census of 1962 not only recorded a population of 55.6 millions (an astonishing advance on the 30.4 millions of the 1953 census), but placed 29.8 of these in the north, thus endowing it with a built-in majority over the other regions.' The Eastern and Mid-Western Regions rejected the result, whilst the Western Region became split - Chief Akintola's party joining the north in the N.N.A. as described below, and the remaining Yoruba joining the N.C.N.C.

3 See p 93 above.

4 The Nigerian National Alliance, comprising the N.P.C. and Chief Akintola's N.N.D.P.

5 The United Progressive Grand Alliance, comprising the N.C.N.C. and the A.G.

6 Thus, permits for campaign meetings were refused, the party was precluded from filing nomination papers for candidates and its members subjected to general harassment and persecution. For further details, see Nwabueze, supra, pp 148-149.

7 See Nwabueze, ibid.

8 Perham, op cit, p 5.

The Western Region elections of 1965 were marred by electoral malpractices even more brazen.[1] The regional premier, Chief Akintola, had declared his determination that his party would be returned to power 'whether the people voted for them or not' [2] and the election "results" reflected this. '/T/he people of Western Nigeria /rebelled/... and launched a regime of violence and arson'[3] that continued until the military coup.

## 2.3.19. 1966 - The Beginning of Military Rule

A group of army officers decided that the only solution lay in military intervention. A coup d'etat was initiated on 15 January 1966[4] in which the Prime Minister, amongst others was murdered[5], and the 'remaining Federal Ministers handed their powers[6] to the senior soldier, the Ibo General Ironsi'[7] who formed the first military administration under

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1 Again, opposition candidates were precluded from filing nomination papers; there was a wholesale 'trafficking in ballot papers; and election results were blatantly subverted by the government-controlled radio. For full details, see Nwabueze, supra, pp 149-150.

2 Nwabueze, ibid, p 150.

3 Ibid.

4 See Perham, supra, p 6.

5 Those killed, in addition to the Prime Minister (Abubakar Tafawa Balewa), were the finance minister, Chief Akintola, and the premier of the North, the Sardauna of Sokoto.

6 The legitimacy of this 'transfer' became a matter of considerable controversy, following the Lakanmi case, discussed below

7 Perham, op cit, p 6. For a more detailed account, see Nwabueze, A Constitutional History of Nigeria, London, 1982, pp 161-162 and p 169.

a significantly amended Constitution[1]. Although the initial public reaction to the coup was generally one of relief, suspicion soon began to grow that it reflected Ibo determination to dominate the remainder[2]; and when - in May 1966 - Ironsi announced[3] the dissolution of the regions in favour of a unitary state (in which, it was feared, the sophisticated Ibos would quickly gain the ascendancy[4]) a further coup was launched by northern soldiers.[5] Ironsi was murdered, together with a number of others[6] on 29 July 1966; and 'after some confusion the young Chief of Staff, Colonel Gowon, took over'.[7]

## 2.3.20. 1967 - The Outbreak of Civil War

Although Gowon repealed the decree establishing a unitary Nigeria[8] and called a 'meeting of notables from all regions

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1 This was effected under the Constitution (Suspension and Modification) Decree No 1 of 1966. These, and other Constitutional decrees (with the exception of those affecting the regional/state structure, discussed below) are discussed further below in relation to the Lakanmi case, decided in 1970; and in the context of the Nigerian Bill of Rights.

2 See Perham, supra, p 6.

3 This was effected in Decree No. 34 of 1966.

4 See Perham, supra.

5 Ibid.

6 Including the military governor of the Western Region and a number of Ibo officers.

7 Perham, supra, p 6. Perham points out he reflected something of a compromise choice, for '/h/e had the advantage not only of a good reputation, but, as a northerner who yet came from a Middle Belt tribe, and was also a Christian, he seemed to bridge the fissures which had split Nigeria'.

8 See the Constitution (Suspension and Modification) (No.9) Decree, no 59 of 1966.

to discuss the future of /the country/[1]', Northern fear and anger against the Ibo had already been aroused; and this resulted in a wave of violence against the Ibo in which thousands were massacred and millions streamed back to the East.[2] The governor of the Eastern Region 'became convinced that Gowon was either unable or unwilling to safeguard Eastern life and property throughout the Federation'[3] and demanded greater regional autonomy. The meeting of the two leaders at Aburi in January 1967 produced little satisfaction.[4]. Gowon pressed on with his solution - the splitting of the three Regions into 12 states[5] - which 'the Igbo elite viewed... as a ploy to undermine the power of the Igbo and the unity of the Eastern Region'[6] On 30 May 1967 the East seceded from Nigeria as the independent Republic of

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1 See Perham, supra, p 7.

2 See Perham, ibid, pp 6-7 and Wiseberg, op cit, p 64.

3 Wiseberg, ibid. He points out that the 'last of these pogroms (in which soldiers played a part) occurred in October 1966, at a time when Gowon was already in power.'

4 See Perham, supra, pp 7-8, who points out the Ojukwu, particularly, felt that Gowon had not kept his word.

5 See the States (Creation and Transitional Provisions) Act, No 14 of 1967.

6 Wiseberg, op cit, p 65. Wiseberg points out that by splitting the Eastern Region into three states, not only was 'political power weighted in favour of /the minorities in the Region/ - but so too were the economic spoils. The East Central State (Igboland) got none of the oil-rich areas; it was cut off from access to the sea; and both the Igbo town of Port Harcourt (with Nigeria's main oil refinery) and the oil terminal at Bonny, went to Rivers state'.

The division of Nigeria into twelve states at this point in time is reflected in Map B, Appendix I.

Biafra, and the civil war began.[1]

## 2.3.21. 1970 - The End of the Civil War and the Promise of Return to Civilian Government; the 'Lakanmi' Case and Decree No. 28 of 1970.

The Biafran rebellion ended in January 1970, and a general amnesty - with certain exceptions[2] - was granted to the rebels by the Federal Military Government[3]. The Federal Military Government also 'produced a time-table for a return to civilian rule by 1976[4] but with no clear indication as to what 'constitutional arrangements /could/ be made to ensure political unity once the artificial supervision of the military /was/ withdrawn.'[5]

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1 The secession was effected by Lieutenant-Colonel Odumegwu Ojukwu, 'acting on a mandate given to him three days before by a joint resolution of the consultative assembly for the region and the advisory council of chiefs and elders'. See Nwabueze, A Constitutional History of Nigeria, supra, p 179. For further details regarding the conduct of the civil war, see /1968-69/, /1969-70/, and /1970-71/ Africa Contemporary Record; and see also Perham, op cit, pp 9-12, and Wiseberg, p 65 et seq. For analysis of the legal implications of the attempted secession, see Nwabueze, ibid, Chapter Eight and see also Nwabueze, Constitutionalism in the Emergent States, supra, Chapter Nine.

2 Thus Ojukwu, for example, was sent into exile - and remained so for twelve years until his return to Nigeria in 1982.

3 See Nwabueze, A Constitutional History of Nigeria, supra, p 200.

4 /1970-71/ Africa Contemporary Record, p B 411.

5 Ibid.

In the Lakanmi[1] case (discussed further below[2] in relation to the constitutional guarantees of fundamental rights), the Supreme Court of Nigeria held that the federal military government had come to power - under the 1963 Constitution - and on the basis of necessity generated by the events of 15 January 1966[3]; and that its powers to amend the Constitution were accordingly limited to those 'that could properly be justified by the doctrine of necessity'.[4] The Federal Military Government responded by the promulgation of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970[5] which nullified the Lakanmi judgement and declared that the military authorities had assumed power by revolutions[6] which 'effectively abrogated the whole pre-existing legal order in Nigeria except /as/... preserved under the Constitution (Suspension and Modification) Decree 1966[7]... and established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria'[8].

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1 Lakanmi v Attorney-General (West), SC 58/69 of 24 April 1970.

2 See p173 below, where the effect of the military take-over on the guarantees of fundamental rights is reviewed.

3 This, of course, is the date of the first military coup, described above.

4 Nwabueze, A Constitutional History of Nigeria, supra, p 172.

5 No. 28 of 1970.

6 That is, those of 15 January 1966 and 29 July 1966.

7 Decree No. 1 of 1966.

8 Preamble, Decree No. 28 of 1970. 'By s 1, this recital was declared to be part of the decree'. See Nwabueze, op cit, p 175. The significance of this Decree is considered further below, in relation to the guarantees of fundamental rights and the effect - on these - of military rule.

## 2.3.22. 1975 - A Further Coup and the Appointment of the Constitution Drafting Committee

In an Independence Anniversary Broadcast[1] on 1 October 1974, General Gowon had announced an indefinite postponement[2] of the return to civilian rule, which had previously been promised for 1976. Dismay at this, coupled with doubts as to Gowon's capacity to solve Nigeria's economic problems or to eradicate corruption, (together with resentment of his increasing inaccessibility[3]) resulted in a bloodless coup on 29 July 1975[4] in which Brigadier Murtala Muhammed succeeded Gowon as Chief of the Supreme Military Council[5] and Head of State.

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1 For the text of important excerpts from this broadcast, see /1974-75/ Africa Contemporary Record, pp C 82-84.

2 Gowon stressed that this did not mean that the military government had abandoned the idea of returning to civilian rule, but gave no indication as to when this would be effected. All he stated was that a panel to draft a new constitution would be appointed 'in due course'. See p C 84, supra. He also emphasised that the reason for the postponement was that Nigeria had not yet achieved sufficient stability; and that there was reason to fear that the return of civilian rule in 1976 would usher in 'the old cut-throat politics that once led /Nigeria/ into serious crisis.

3 See /1975-76/ Africa Contemporary Record, p B 782. As regards the last factor, it seems that Gowon, had 'ceased to consult his colleagues or to heed advice from his countrymen, however eminent'.

4 See /1975-76/ Africa Contemporary Record, p B 781.. The coup occurred whilst Gowon was leading Nigeria's delegation at the O.A.U. summit in Kampala.

5 For further information regarding the composition and powers of this Council, see Nwabueze, supra, p 226.

On 1 October 1975[1], Muhammed announced a five-stage plan[2] for the return to civilian government by 1979. Pursuant to this proposal, he appointed a Constitution Drafting Committee[3] which - within the framework of certain guidelines[4] - was to prepare (by September 1976) a draft Constitution for further consideration by an especially formed Constituent Assembly[5].

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1 This was in the course of the 15th Independence Anniversary Broadcast. See /1975-76/ Africa Contemporary Record, p B789.

2 The first stage would be the creation of new states and the preparation of a draft constitution; the second would be the reorganisation of local government and the holding of local elections (in which candidates would be judged on personal merit, without regard to party politics), and the formation of a Constituent Assembly (partly elected - through the local government elections - and partly nominated) to draw up a constitution; and the third stage would be the lifting of the ban on party politics; and State and Federal elections would form the fourth and fifth stages. See /1975-76/, Africa Contemporary Record, supra.

3 This comprised fifty members - two appointed from each state and the rest chosen for their knowledge of history, law, economics and political science. Its chairman was Chief Rotimi Williams.

4 See /1975-76/ Africa Contemporary Record, pp B789 - 791. For example, the Committee was urged to consider ways of promoting consensus decision-making, 'depoliticizing' the importance of the census, limiting the number of political parties (or abolishing them altogether), and to examine the possibilities of establishing a presidential system of government which would reflect the country's federal character and stress the principle of accountability to the people. See also James S. Read, 'The New Constitution of Nigeria, 1979: "The Washington Model"?, supra, pp 134 - 135. The work of the Committee is discussed further below.

5 See n 2 above, and the further discussion of the Constituent Assembly below, in the context of Nigeria's legal system and new Constitution.

## 2.3.23. 1976 - An Attempted Coup; The Creation of Seven New States; and the Report of the Constitution Drafting Committee

General Murtala Muhammed was assassinated on 13 February 1976 in an abortive coup[1] and was succeeded by Lieutenant-General Olusegun Obasanjo. The country 'recovered surprisingly quickly from this crisis'[2] and the Federal Military Government pressed on with its five-point plan for the return to civilian rule. Shortly before the abortive coup, it created seven new states, raising the total to nineteen[3], but resisted pressure for the creation of more. In August 1976, it 'announced sweeping local government reforms'[4] involving the establishment of Local Government Councils with responsibility, inter alia, for

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1 See /1975-76/ Africa Contemporary Record, p B 783. The attempted coup was over within two hours. Its leaders (General Bisalla and Colonel Dimka) together with 38 other officers and civilians were publicly executed after having been convicted in secret by a military tribunal. See Africa Contemporary Record, ibid, pp B 784-785.

2 /1976-77/ Africa Contemporary Record, p B 661. Considerable controversy, however continued to surround the alleged involvement in the abortive coup of General Gowon, now living in the United Kingdom.

3 See States (Creation and Transitional Provisions) Act, No. 12 of 1976. The Panel on the Creation of States had received the largest number of petitions with regard to the division of the South-Eastern State into two new States. The Panel recommended that this be done, but the government disagreed. Agitation for such division continued in the area; and Obasanjo firmly stated in August 1976 that 'no more States would be created'. See /1976-77/ Africa Contemporary Record, p B 666.

The division of the country into nineteen states at this point in time is reflected in Map C, Appendix I.

4 /1976-77/ Africa Contemporary Record, p B 668. See also Read, op cit, p 144.

agriculture and primary education. Elections to these Councils were held in December 1976[1] and provided (despite continuing bans on political parties and public speech-making[2]) 'the first exercise of the sort since 1965'[3].

In September 1976, the Constitution Drafting Committee completed its work and presented a draft constitution to the Federal Military Government, which '"launched" /it/ for public debate on 7th October 1976'[4]. The Committee's accompanying Report is considered further below.[5]

## 2.3.24. 1977 - The Establishment of the Constituent Assembly

The local councillors chosen at the end of 1976 formed electoral colleges for the election (in September 1977) of members of the Constituent Assembly[6] which was given:

> '"full powers to deliberate upon the draft Constitution of the Federal Republic of Nigeria drawn up by the Constitution Drafting Committee appointed by the Federal Military Government"'[7].

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1 Ibid, p B 668. 'Voting rights for women became a controversial issue in the northern states... /and/ women were enfranchised for the first time in Plateau, Benue and Kwara States'.

2 Ibid.

3 Ibid, p B 669.

4 Read, supra, p 144.

5 See below, in the section on Nigeria's new constitution.

6 See Read, supra.

7 Constituent Assembly Decree, 1977, no 50, cited by Read, op cit, p 144.

The Constituent Assembly was composed of 203 members elected by the local governments of the states,[1] the Chairman of the Constitution Drafting Committee and the Chairmen of its Sub-Committees and twenty other members nominated by the Supreme Military Council; and it was chaired by Mr. Justice Udoma.[2] It met for the first time on 6th October 1977 and was given one year to complete its task. 'It conducted its proceedings according to the Standing Orders of the Old House of Representatives'[3]; and thus the draft prepared by the Constitutional Drafting Committee was put through all the processes employed for the passing of legislative proposals in a legislative assembly - first and second readings, committee stage and final passage on a third reading.[4]

## 2.3.25. 1978 - The Promulgation of the Presidential Constitution and Lifting of the Ban on Political Parties.

Little substantive change was effected by the Constituent Assembly to the draft prepared by the Constitutional Drafting Committee and 'on many sections the Assembly debated various amendments only to return to the Committee's draft,

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1 The number elected per State varied from 16 members (Kano State) to 7 (Niger State).

2 See Read, supra.

3 Ibid, p 145.

4 See Nwabueze, A Constitutional History of Nigeria, supra p 256. Its proceedings were cut short on 5 June 1978, when 'the Chairman adjourned the Assembly indefinitely after accepting a motion for the formal third reading of the Draft Constitution' (see Read, supra) and this despite the protests of some 101 members that its work was not yet complete. See further /1978-79/ Africa Contemporary Record, p B724. 'It worked in public until January 1978 when it decided to bar observers and the press after the Daily Times had criticised the standard of debate.' /1977-78/ Africa Contemporary Record p B 733.

with perhaps minor variations'[1]. The Constitution agreed by the Constituent Assembly was presented in August 1978 to the Supreme Military Council; and the Federal Military Government - having made certain further amendments to it[2] - then proceeded to enact it as an 'ordinary Decree: the Constitution of the Federal Republic of Nigeria (Enactment)

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1 Read, supra. One of its most 'striking decisions', however, was the deletion of the provisions for an "ombudsman" (restored, however, by the Federal Military Government as explained below). The significance of its contribution was reduced by the fact that many important matters were removed in toto from its ambit; notably provisions for elections and the regulation of political parties, enacted by the F.M.G. in the Electoral Act of 1977 (No 73 of 1977), based upon the recommendations of the Constitution Drafting Committee. The most controversial question dealt with by the Constituent Assembly was the proposed establishment of a Federal Sharia Court of Appeal. This proposal of the Constitution Drafting Committee was ultimately rejected in favour of providing for 'appeals from State Sharia Courts of Appeal to... the Federal Court of Appeals, specially constituted /for the purpose/ by three justices versed in Islamic law'. (See Read, ibid, p 146). For a further summary of the changes effected by the Assembly see /1978-79/ Africa Contemporary Record, p B 724.

2 See Read, ibid, pp 146-147. A particularly interesting change was the restoration by the Federal Military Government of the "ombudsman" provisions deleted by the Constituent Assembly. The Federal Military Government further entrenched the Land Use Act of 1978 (No 6 of 1978) as well as provisions governing the Public Service Commission (or "ombudsman"), the National Youth Service Corps and the Nigerian Security Organisation. See also /1978-79/ Africa Contemporary Record, pp B 724-725. Seventeen amendments were made, Obasanjo asserting that these were 'imperative' to ensure the 'attainment of good government.'

[Act[1]], of which the new Constitution forms the Schedule'[2]. The provisions of this Constitution are sketched in outline below[3] and suffice it therefore, for present purposes, to note that its most significant innovation was the introduction of a directly-elected executive president with powers which clearly reflect the influence of the 'Washington' constitutional model.[4]

On the same day the Constitution was enacted (21 September 1978), the twelve-year prohibition on the activities of political parties was lifted;[5] and '/p/olitical associations proliferated to over 50 by the end of 1978'[6]. Nineteen sought registration by the Federal Election Commission in December 1978, but only five succeeded in meeting the stipulated criteria,[7] particularly as regards the

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1 No. 25 of 1978.

2 Read, op cit, p 146. Read points out that 'Section 1 of the Act gives the force of law to the Constitution and section 2 authorises the future reprinting of the Constitution alone, without the enacting provisions.' The Federal Military Government further provided (by transitional Decrees) for the new Constitution to come into effect as a whole on 1st October 1979. See Read, ibid, p 147.

3 See p 112 below.

4 See Read, supra, p 155; and see also p 131, where Read submits that what 'has given /the return to civilian rule/ quite exceptional importance is the fact that Nigeria, turning its back on Westminster, has chosen to adopt a new constitutional structure which can aptly be regarded as a version of "the Washington model"'.

5 See Read, ibid, p 165.

6 See /1979-80/ Africa Contemporary Record, p B 583.

7 See the Electoral Act of 1977 (No. 73 of 1977).

requirement of wide-ranging national support.[1]

## 2.3.26. 1979 - The Return to Civilian Rule

In January 1979, the Federal Election Commission (F.E.D.E.C.O.) announced the five parties which qualified for registration - these being the National Party of Nigeria (N.P.N.), the Unity Party of Nigeria (U.P.N.), the Nigeria People's Party (N.P.P.), the Great Nigeria People's Party (G.N.P.P.), and the People's Redemption Party (P.R.P.)[2]. It also screened some 8,728 candidates and disqualified over 1,000 mainly because of tax defaults.[3] It also 'launched a 'public enlightenment campaign' on voting procedures through 'radio jingles, T.V. and newspaper advertisements and films'[4] whilst power 'to control public meetings and

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1 See /1978-79/ Africa Contemporary Record, p B 730. See also L.A. Jinadu, 'The Federal Electoral Commission' in O. Oyediran (ed.,) The Nigerian 1979 Elections, London and Lagos, 1981 pp 17-39, p 33, for a description of the controversy provoked by the Commission's decision.

2 For a summary of information regarding these parties, see /1978-79/ Africa Contemporary Record, pp B 730-731. The parties reflected, to a considerable degree, the political divisions pre-dating the assumption of power by the military in 1966, the U.P.N., for example, being 'fashioned after the old Northern People's Congress (N.P.C.)' See /1979-80/ Africa Contemporary Record, p B 583, and see also Jinadu, supra, p 33 and L. Anise, 'Political parties and Election Manifestoes', in The Nigerian 1979 Elections, supra, pp 67-90.

3 See /1979-80/ Africa Contemporary Record, p B 583. Two party leaders, including Dr. Azikiwe, were disqualified but appealed successfully against this ruling. The disqualification was effected under s 72 of the Electoral Act, 1977, which prescribes the various requirements which must be satisfied by candidates for election. The disqualification of Azikiwe and the reversal of this by the Enugu High Court are further described by Jinadu, supra, p 36.

4 /1979-80/ Africa Contemporary Record, p B 582.

processions, the display of party flags, etc..,'[1] was provided by the Public Order Act of 1979. After some six months of electoral campaigning, voting took place on successive Saturdays for the Senate,[2] the House of Representatives,[3] the State House of Assembly[4] and the State Governors[5]. Finally, on 11 August, the presidential election was held; and the winner was declared[6] to be Alhaju Shehu Shagari of the National Party of Nigeria.[7]

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1 Read, op cit, p 165.

2 On 7 July 1979.

3 On 14 July.

4 On 21st July.

5 On 28 July.

6 This followed a challenge that Shagari had, in fact, failed to secure the degree of support required of a Presidential candidate by section 34A(1) of the Electo- Act of 1977 (No. 73 as amended by the Electoral (Amendment) Act of 1979, No. 32). The dispute was resolved by the Supreme Court of Nigeria in Shagari's favour. For commentary on the case, and extracts from the judgment of the court, see James S. Read, 'Note:"Justice in Mathematics?" in (1979) 23 Journal of African Law, pp 175-182.

7 The breakdown of state support for the five political parties in the election overall was as follows:
National Party of Nigeria: Sokota, Niger, Kwara, Bauchi, Benue, Cross River, Rivers.
Nigerian People's Party: Plateau, Anambra, Imo
Great Nigeria People's Party: Borno, Gongola
United Party of Nigeria: Lagos, Ogun, Oyo, Ondo, Bendel
People's Redemption Party: Kaduna, Kano
(See the Economist, 23 January, 1982, Nigeria Survey, p 21).

On 1 October 1979, the Second Republic was born; and Shagari assumed office as President under the new Constitution, assured - through an alliance with the Nigeria People's Party - of a 'workable majority'[1] in the federal legislature. Notwithstanding this, however, the period since 1979 has witnessed considerable difficulty in getting legislation passed.[2] The period has also been characterised by a series of challenges to the constitutionality of a variety of governmental actions and this has generated an unprecedented flood[3] of judicial decisions on the proper interpretation of the Constitution. It is still difficult, accordingly, to assess the degree of success the Constitution has enjoyed in helping to solve Nigeria's 'deep-seated political problems'[4]. At present, the country is in the throes of preparing for fresh elections, for the four-year terms of office provided by the Constitution are due to expire in October 1983. President Shagari has won widespread respect since his election, and there seems little doubt that continuity in the presidential incumbent will at least be assured - though it still remains to see how

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1 See Read, 'The New Constitution of Nigeria, 1979', supra, p 165.

2 For example, the enactment of new formula for allocation of federal revenue between the centre and the various states was one of the first tasks facing the federal assembly - as the Constituent Assembly had been unable to reach agreement on this point. It took until January 1981 for an Act to be passed, and as this was immediately challenged for failure to comply with s 58(3) of the Constitution (in Attorney-General, Bendel State v Attorney General, Federation and others,(1982) 3 N.C.L.R.1)and found unconstitutional by the court, it was not until January 1982 that legislation on this question was finally enacted. Revenue allocation is traditionally a sensitive issue - but (even so) this appears an inordinately long period. (Source: Seminar address by Professor J.S. Read, Institute of Advanced Legal Studies, London, 6 March 1982).

3 Thus the newly instituted Constitutional Law Reports of Nigeria list over 150 cases involving constitutional issues which have come before the courts since 1 October 1979.

4 See Read, supra, p 166.

the "Washington" Constitution will develop further in future years.[1]

## 2.4. Outline of Nigeria's Legal System

Having thus covered the major events in Nigeria's history, it is now appropriate to devote some attention to outlining Nigeria's legal system; and in this section it is proposed briefly to examine the Presidential Constitution of 1979 and the sources of Nigerian law (including the structure of the country's courts).

### 2.4.1. The Presidential Constitution of 1979[2]

Detailed consideration of the 1979 Constitution, contained in 279 sections and 6 schedules, lies outside the scope of this study. Instead, it is proposed to concentrate on the various principles underlying its formulation - and to examine, in brief outline only, the manner in which those principles have been given expression in its provisions.

According to Nwabueze,[3] the 1979 Constitution is premised

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1 In particular, it will be interesting to see whether Nigeria (having adopted a constitution loosely modelled on that of the United States of America) will also - in future - begin to follow the approach adopted by the Supreme Court of the United States to constitutional issues: particularly as regards the guarantees of fundamental rights. The advantage of so doing (in the context of freedom of expression especially) is a major theme of this study; and will be further elaborated in due course.

2 Although this Constitution was enacted in 1978, it came into effect only in 1979 and is commonly known as the Constitution of the Federal Republic of Nigeria, 1979. (It may also be recalled - from p 108, n 2 above - that the enacting Act (Act no 25 of 1978) authorised the future reprinting of the Constitution alone, without the enacting provisions).

3 B O Nwabueze, The Presidential Constitution of Nigeria, 1982

upon the following concepts and needs:

(i) 'The need for principle and probity in government and politics'.[1]

In the view of Nwabueze, principle and probity are required to counteract the self-interest and narrow regional concern which underlay the failure of the First Republic. One of the major shortcomings of the 1963 Constitution was its failure to emphasise the responsibilities that accompany power or to cast any positive duties upon those in authority (other than the negative obligation not to infringe the fundamental rights guaranteed by the constitution[2]). This defect was acknowledged by the Constitution Drafting Committee[3] which accordingly recommended the inclusion in the 1979 Constitution of 'a statement of fundamental objectives and directive principles'.[4] These would not only 'defin/e/ the goals of society[5] and prescrib/e/ the institutional forms and procedures for pursuing them' [6], but would also serve to unite Nigerian society into one nation, bound together by common values and goals, to 'se/t/ the parameters of government'[7] and 'to remind those in authority that their position is one of trust'.[8]

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1 Ibid, p 20.

2 See ibid, pp 20-22.

3 Report of the Constitution Drafting Committee, /1976/ Vol. 1, pp v - vii.

4 Ibid, at para., 3.2-3, p vi.

5 Ibid. The Committee pointed out that, without these, 'a new nation is likely to find itself rudderless'.

6 Ibid.

7 Ibid.

8 Ibid.

The Fundamental Objectives and Directive Principles of State Policy thus recommended by the Constitution Drafting Committee are embodied in Chapter II of the 1979 Constitution. Its provisions are non-justiciable[1] but it is nevertheless declared to be 'the duty and responsibility of all organs of government'[2] to observe and apply the political, economic, social, educational and foreign policy objectives described in the Chapter.[3] These include[4] the active encouragement of national integration[5], the promotion of planned and balanced economic development,[6] the provision of adequate medical facilities[7] and of public

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1 See section 6(6)(c) of the Constitution. This reflects the recommendation of the Committee, reached after considerable controversy, that the provisions should not be justiciable for fear of provoking conflict between the judicial and other branches of government. See the Report of the Committee, op cit, p vii, Read, op cit, p 136 and Nwabueze, op cit, p 23.

2 s 13, Constitution of the Federal Republic of Nigeria, 1979.

3 In addition, the Chapter includes a directive on Nigerian culture, a statement of the rights of the mass media, and a description of the national ethic.

4 The choice of provisions deserving express mention in a survey as brief as this is inevitably arbitrary. For further detail regarding the content of the Chapter, see Nwabueze, supra, pp 22-23 and Read, supra, pp 136-139.

5 s 15(3), supra.

6 s 16(2)(a), ibid. The State is to control 'major sectors of the economy', as determined by the National Assembly, every citizen having the right to engage in any economic activities outside the major sectors of the economy: ss 16(1) and(4). This was one of the most controversial issues considered by the Committee. See Read, supra, p 137.

7 s 17(3)(d), ibid.

assistance in deserving cases[1], the promotion of science and technology[2], the eradication of illiteracy[3] and the promotion of 'African Unity' and the total liberation of Africa[4]. Furthermore, the media are enjoined[5] to uphold these objectives at all times as well as 'the responsibility and accountability of the Government to the people'.[6]

In further keeping with the need for principle and probity in politics as well as government, political parties are obliged to ensure that their programmes, aims and objects comply with Chapter II[7], and '/t/he use of organised coercion or any other form of organised violence for political purposes is prohibited.'[8]

In addition, the maintenance of 'principle and probity' is encouraged through the inclusion[9] of an enforceable[10]

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1 s 17(3)(g), ibid.

2 s 18(2), ibid.

3 s 18(3), ibid.

4 s 19, ibid.

5 This may be too strong a word. The precise formulation (in s 21) is that the media 'shall at all times be free' to do so. This is further discussed at p 213 below.

6 s 20, supra.

7 s 204, ibid.

8 Nwabueze, supra, p 23. This is provided by s 207, ibid.

9 This was introduced on the recommendation of the Consitution Drafting Committee and brings Nigerian law into line with developments in other Commonwealth states in this regard. See Read, op cit, p 161.

10 Thus, a Code of Conduct Tribunal has been established, with power to punish public officers for contravention of the Code by, inter alia, vacation of office or seat, disqualification from office for up to ten years, and forfeiture of property acquired through abuse of office. see ss 17-20, Fifth Schedule, Constitution of the Federal Republic of Nigeria, 1979.

Code of Conduct, contained in the Fifth Schedule, which is designed to 'ensure that persons who are entrusted with public authority do not abuse their trust to enrich themselves or to defraud the nation'.[1] The 'public officers' to whom the Code applies are broadly defined[2] and all are prohibited from placing themselves in a position where public and private interests conflict[3] or 'from accepting any property or benefit[4] for the discharge or non-discharge of their duties'[5]. All public officers are obliged to declare their assets at the commencement of their appointment[6] and '/a/ check on corrupt acquisitions by public officers is... maintained through /further/ declaration and verification of assets... at intervals of four years during tenure and at the end of the appointment'.[7]

(ii) 'The Centrality of Man's humanity'[8]

Man has innate needs, more fundamental than the needs of the society he creates in order to serve his interests; and

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1 Report of the Constitutional Drafting Committee, op cit, para. 7.5, p xxxiii.

2 See Part II of the Fifth Schedule. The list ranges from the President and Vice-President to the staff of local government councils, para-statal corporations and State-owned universities and colleges.

3 s 1, part I, Fifth Schedule, supra.

4 Benefits are broadly defined and extend, for example, to 'private' loans.

5 Nwabueze, op cit, pp 23-24.

6 s 11, Part I, Fifth Schedule, supra.

7 Nwabueze, supra, p 24.

8 Ibid.

the overriding importance of these human needs is recognised in the 1979 Constitution by the provision (in Chapter IV) of guarantees of certain fundamental rights such as the rights to life, liberty, to freedom of thought, expression and movement. Since the full exercise of these rights by every individual may cause conflicts within society, the Constitution further attempts to balance the competing interests of man and society by permitting derogation from the guaranteed rights in certain circumstances.[1] These guarantees - particularly the vital protection given to freedom of expression which is of fundamental importance to the law governing the media - are further examined in due course in the section on Nigeria's Bill of Rights.

(iii) 'National unity and stability'[2] in the midst of diversity.

The need for unity - and hence stability - in the country whose borders are the arbitrary and artificial product of the colonial "scramble for Africa", in which there are traditionally more than 250 ethnic groups of fundamentally different culture and outlook[3], and which has been administered

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1 See Nwabueze, ibid, p 25.

2 See Nwabueze, op cit, p 25. It is submitted, that Nwabueze's formulation does not go far enough; and that the reality of diversity must be recognised as well as the need of 'unity and stability'. It is submitted, further, that this reality (largely the product of Nigeria's colonial past) is indeed reflected in the Constitution, as further explained in the text below.

3 Reference has already been made to the traditional divisions between three especially important groups: the Hausa, Yoruba and Ibo.

as a unit for less than 70 years[1], is strong. It is reflected as a dominant theme in the Constitution, in the preamble;[2] in the Political Objectives in Chapter II[3] (including 'the general requirement that the composition of the Federal Government shall "reflect the federal character of Nigeria" with no predominance of persons from a few States, ethnic or other sectional groups'[4]; in the provisions regarding the appointment of Ministers which must reflect not only this general requirement but also ensure that there is 'at least one Minister from each State, who shall be an indigene of such State'[5]; in the requirement that the President (even if the sole candidate) must command a considerable measure of support[6] in at least two-thirds of all the States[7]; in the criteria for the

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1 It may be recalled that North and South were unified only in 1914, as explained in the section on the History of Nigeria above.

2 This recites the resolve of the people of Nigeria, 'to live in unity and harmony as one indivisible and indissoluble Sovereign Nation'. The same principle is reiterated in s 2(1) of the Constitution, supra.

3 s 15, ibid, which requires, inter alia, the active encouragement of national integration.

4 See Read, op cit, p 158, citing s 14(3), ibid. Similar provisions with regard to State and local governments are contained in s 14(4).

5 s 135(3), ibid.

6 This being 'not less than one-quarter of the votes cast at the election': ss 125 and 126, ibid, (the latter reflecting the same requirement where there are two or more Presidential candidates).

7 ss 125 and 126, ibid. See also Nwabueze, supra, p 26, who explains that these requirements are designed to ensure that the President is able to identify with the country as a whole and hence to 'serve as a focal point of loyalty in the nation'.

recognition of political parties, only those commanding broad-based support being entitled to registration[1] and in the provisions giving every state representation in the federal legislature[2], in 'some of the more sensitive federal commissions'[3] and in the armed forces[4].

At the same time, the reality of diversity within Nigeria is accorded appropriate recognition in the division of powers between the centre and the component states of the Federation. Thus the State legislatures retain residual authority to legislate[5] on all matters other than those

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1 See s 202, ibid, especially (b) and s 203(1)(b) and (2)(b).

2 Thus, the Senate consists of five members from each State (s 44, ibid,) with one in due course from the Capital Territory. '/T/he number of seats per State in the House of Representatives varies from 10 in Niger State to 46 in Kano State'. See Read, supra, p 152. This is because constituencies are defined by reference to 'the population quota'.

3 See Nwabueze, supra, p 26 and Read, supra, pp 158 - 159. These include the Council of State, the National Population Commission and the Federal Electoral Commission.

4 See Nwabueze, ibid.

5 This was a feature of the first federal constitution of Nigeria, in 1954, as explained in the section on the history of Nigeria, above. The Constitution Drafting Committee considered reversing this division to give residual powers to the centre, but was not persuaded to make the change. See its Report, op cit, para. 6.2, p xxii.

expressly reserved for exclusive federal competence[1] or expressly made subject to concurrent federal and state jurisdiction.[2] Instead, of providing - as regards the latter category - that federal law will always take precedence over state legislation,[3] the new Constitution has a number of more detailed provisions[4] which effectively preclude the overlap of federal and state powers in relation to many matters on the Concurrent List,[5] and which are designed to ensure that the 'Federal Government /cannot/

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1 These items are listed in the Exclusive List, contained in Part I of the Second Schedule. The List now contains 66 Items (as opposed to 44 under the 1963 Constitution) and significant items which have moved to the Exclusive List include 'census; arms and ammunition; labour; quarantine /and/ prisons'. See Read, op cit, p 153. Particularly important is Item 61 which gives the Federal legislature exclusive competence to establish authorities to promote and enforce the observance of the fundamental objectives and directive principles contained in the Constitution. The Constitution Drafting Committee recognised that this might conceivably result in a whole-scale usurpation of state powers by the centre; but thought the difficulty could be avoided by maintaining strict scrutiny of any federal measures in this regard to ensure that they were geared to a specific purpose, failing which they should be considered void. See the Report, supra, 6.4, p xxii.

2 These matters are listed on the Concurrent List, contained in Part II of the Second Schedule.

3 As provided by the 1963 Constitution (Act no 20 of 1963).

4 See, for example, Item 16 on the Concurrent List. Thus, both 'Federal and State legislatures may set up bodies to censor films, and although Federal law normally prevails, it is provided that nothing authorises the showing of a film which has not been approved by such State authority'. See Read, supra, p 153, who points out that this reflects the still contrasting cultural milieux of /the/ different States'.

5 See Read, ibid.

... insist on uniformity /where/ diversity in no way conflicts with national unity'.[1]

(iv) Need for effective government

This was considered a cardinal requirement by the Constitution Drafting Committee which emphasised that '/t/he separation of the Head of State from the Head of Government[2] involves a division between real and formal authority ... /which/ is meaningless in the light of African political experience and history'[3]. It cited the experience of Nigeria, Uganda, Lesotho and Swaziland as evidence that the division results 'in a conflict of authority and an unnecessary complexity and uncertainty in governmental relations'[4]; and recommended the introduction of an 'executive president' who should be Head of State and Head of Government as well as Commander-in-Chief of the Armed Forces. This would promote unity, energy and despatch in the fulfillment of executive responsibilities,[5] and would preclude any dilution of executive responsibility[6] and would entail the additional advantage that the holder

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1 See the Report of the Constitution Drafting Committee, para. 6.4., p xxii.

2 This, of course, reflects the Westminster constitutional model, in which the Head of State has only titular authority, and executive power resides in the Prime Minister and Cabinet who are responsible to the elected legislature.

3 See the Report of the Committee, supra, paras. 7.1-3, p xxiv.

4 Ibid.

5 See ibid, paras. 7.1-5, p xxx.

6 Ibid, paras, 7.1-6. The Committee pointed out that a plural executive may make it difficult to determine on whom any blame should properly fall. This problem is particularly acute when the prime minister is unable to control his cabinet.

of the presidential office would be the direct choice of the people.[1] The need for a strong executive has been reflected in the Constitution by the provisions[2] for a directly-elected President, who combines all three roles reflected above,[3] in whom the executive powers of the Federation are vested[4] and whose 'assent is normally required for Federal legislation'.[5]

(v) Need for limitations on government

In the words of Nwabueze, '/t/he Nigerian is intensely individualistic and resentful of any arbitrary or autocratic impositions upon his freedom of action'.[6] The need for limitations on the exercise of governmental power was accordingly considered imperative - and this is reflected in a number of provisions of the Constitution. It is thus evident in the constraints surrounding the President who may hold office for a maximum of two terms,[7] who requires legislative approval for certain acts and appoint-

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1 Ibid. Under the Westminster system, by contrast, there is only one popular election - that for members of the legislature; and it is the legislature which then 'makes and unmakes' the executive. (This view is the Committee's, ibid

2 See especially sections 122-134 of the Constitution, supra.

3 See s. 122(2), ibid.

4 s 5(1), ibid, which (in sub-section (a)) specifies that such powers may be 'exercised by him either directly or through the Vice-President and Ministers of the Government'. See also s 136 which makes it clear that responsibilities are assigned to the Vice President and Ministers at the discretion of the President.

5 Read, op cit, p 151; and see s 54(1), ibid.

6 Nwabueze, op cit, p 30.

7 s 128(1)(b), supra. A term lasts for four years: see s 127(2), ibid.

ments[1], whose veto of proposed legislation may be overriden by a two-thirds majority of all members of each federal House[2], who must consult various independent executive bodies before taking certain actions[3] and who may be impeached and removed from office for abuse of power.[4]

In addition to the specific constraints on the President (such as the limitation on his tenure in office or the provisions for impeachment), the need for limitation of governmental power is also reflected in the division of authority between the three different branches of government - legislative, executive and judicial - and in the checks and balances that characterise their relations inter se. The legislative checks on executive power have already been

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1 Thus for example, Senate confirmation of Ministers appointed by the President is required under s 135(2), ibid; and also for Presidential appointments to various Commissions, under s 141(1), ibid.

2 s 54(5), ibid.

3 Thus, for example, the President must hold regular meetings with the Vice President and Ministers under the terms of s 137(2), ibid; and the Council of State has power to advise the President in the exercise of his powers in relation to the census, the prerogative of mercy, and the appointment of members of the Federal Election Commission, the Federal Judicial Service Commission and the National Population Commission: see s 2 Part I, Third Schedule, ibid. In addition, the National Defence Council advises the President on defence, the National Security Council advises him on public security; the National Economic Council advises him on economic affairs, the Judicial Service Commission advises him on appointments to the Bench, and the National Population Commission advises him on population problems, etc. See Read, supra, p 159.

4 s 132, ibid.

noted[1] and the judicial (and other) constraints on the executive are described further below.[2] As regards the legislature, its lawmaking power is curbed, inter alia, through the division of legislative competence between the federal and state legislatures,[3] by the general requirement that legislation requires the assent of the executive[4] and by the rule that the legislature may not usurp the functions nor oust the jurisdiction of the courts.[5] The latter provision is particularly important, for it prohibits the legislature from enacting ad hominem legislation - and thus from punishing[6] named individuals without the safeguard of proper trial by a duly constituted court.[7]

Perhaps the most significant aspect of the division of power is the authority given to the judiciary (whose independence

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1 See p 123 above, where reference is made to the need for the President to obtain legislative approval for certain acts and appointments.

2 See p 125 below.

3 See p 119 above.

4 See p 122 above, and section 54 of the Constitution, supra. As regards state legislation, the assent of the State Governor is normally required, under s 94, ibid.

5 See section 4(8), ibid.

6 For example, by ordering the imprisonment, or the confiscation of the property, of particular individuals - as occurred on a number of occasions during the period of military rule. For illustrations of such ad hominem decrees, see Nwabueze, A Constitutional History of Nigeria, supra, pp 210-212.

7 As pointed out by Nwabueze, in The Presidential Constitution of Nigeria, supra, p 34, 'If... the legislature were to be able to make laws to pronounce a named individual guilty of an offence and to punish him by, say, imprisonment..., the door is left wide open for arbitrariness and for victimisation.

is safegaurded in a number of ways[1]) to declare void and of no effect any legislative enactment or executive conduct which is inconsistent with the Constitution[2] - which thus constitutes the supreme law[3] of Nigeria and provides a

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1 Thus appointments to the bench are made on the advice of the Judicial Service Commissions (see, for eg., s 211 and s 235, supra, - except that the Chief Justice of Nigeria is appointed at the discretion of the President, subject to confirmation by a simple majority of the Senate). In addition, those appointed must be legal practitioners of ten (in the case of State High Court) to fifteen years (in the case of the Supreme Court, for example) standing. See s 211(3) and s 235(3) ibid. Extremely important in this regard is the safeguard against arbitrary dismissal of judges contained in s 256, ibid, which provides, in outline, that judges may be dismissed only for inability or misconduct (including contravention of the Code of Conduct) and then only on the recommendation of either the Federal or a State Judicial Service Commission. The Chief Justice may be removed from office by the President only 'on an address supported by two-thirds majority of the Senate' (s 256(1)(a)(i), ibid).

2 Thus, section 1(3), ibid states categorically: 'If any... law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'. The courts' power to determine the legality of executive action derives principally from s 6(6) which confirms that judicial power extends 'to all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'. These provisions are buttressed by the guarantees of constitutional rights contained in Chapter IV and the power given to the courts under s 42 to secure the enforcement of the guaranteed protections. These provisions are discussed further below.

3 See s 1(1), ibid, which declares: 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'.

standard with which all governmental action must conform.

Further protection is provided by the entrenchment of a number of key provisions of the Constitution - especially those relating to fundamental rights;[1] and to the Public Complaints Commission[2] which provides further important safeguards against administrative abuses.[3]

Finally, the need for limitations on governmental power is clearly reflected in the guarantees of fundamental rights themselves (discussed in further detail below[4]) and in the provisions for periodic elections which provide (at four-yearly intervals) 'an opportunity for the people to express their needs, and to turn out /of office/ a government whose performance fails adequately to provide for them'.[5]

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1 See s 9(3), ibid, which provides that neither Chapter IV (containing the 'Bill of Rights') nor s 8 (dealing with the creation of new states, as further explained below) may be amended save with the approval of at least four-fifths of all the members of the Senate and National Assembly, plus the approval of at least two-thirds of the State Houses of Assembly. (The normal requirement - for the amendment of other provisions of the Constitution - is the same degree of State approval coupled with the approval of at least two-thirds of the members of the National Assembly: see s 9(2), ibid.)

2 See s 274(5), ibid, which provides that the requirements of section 9(2) must be met in order to amend the Public Complaints Commission Act, 1975, as well as various others. See Read, op cit, p 147.

3 The importance of this 'ombudsman" is illustrated by the fact that - in the 1977 calendar year, for example - the Commission received 8,357 complaints. See Read, supra, p 145.

4 See p 170, below.

5 Nwabueze, op cit, supra, p 31.

(vi) Need for economic development

Economic development is a 'paramount need'[1] and its satisfaction calls for 'effective leadership,... able to mobilise the nation and its resources'[2] . Hence the Constitution not only provides for strong central leadership (in the provisions for the office of President, described above) but also facilitates the satisfaction of the differing development needs of the diverse parts of the country by providing for 19 state governments, with strong executive powers similar to those enjoyed by the President[3]. However, since the creation of yet further states 'would operate as a drag on development by stretching the resources of the country /too far/... and by diverting resources needed for development to the payment and maintenance of an unduly proliferated apparatus of state government'[4], the Constitution imposes requirements for the creation of new states which are not only stringent but may, indeed,

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1 Ibid, p 29.

2 Ibid.

3 These are vested in the State Governors. See ss 162-174 and s 5(2), supra.

4 Nwabueze, supra, p 30. It must be acknowledged that Nwabueze does not expressly link these arguments against the creation of new states with the difficulties placed in the path of so doing by the Constitution. However, the requirements for the creation of new States are remarkable for their stringency (as further explained below); and it seems reasonable to surmise that the framers of the Constitution - for these and other reasons of a more political nature - were indeed determined that no new states should be created; and so set about ensuring this by making the procedure required extremely difficult - if not impossible - to fulfill.

be impossible to fulfill.[1]

Finally, the need for development is reflected in the continuation of the local government machinery established by the military government[2]' which guarantees to... local communities /the/ administrative machinery and financial resources needed for their development'[3]; and is further evidenced by the duty enjoined upon local government councils 'to participate in economic planning and development'[4] of their areas of jurisdiction.

Further analysis[5] of the provisions of the 1979 Constitution lies outside the scope of this study. Instead, some consideration must now be given to the important question of the sources of Nigerian law.

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1 See Read, op cit, pp 163-164 who submits: 'If the draftsman was instructed to produce a section which would effectively prevent any future tampering with the present States, then he has succeeded admirably. A section which cannot be understood can hardly be implemented'. (The relevant section is s 8 of the Constitution, supra which is indeed remarkably obscure).

2 It may be recalled, from the section on the History of Nigeria, that the federal military government in 1976 published Guidelines for the establishment of local government councils. See p 104 above, and see also Read, ibid, p 144.

3 Nwabueze, op cit, supra, p 30.

4 See s 7(3), ibid.

5 For further information regarding the provisions of the Constitution, see the lengthy and detailed account in Nwabueze, op cit, supra, and the concise and highly useful summary in Read, supra, pp 147-165. For brief commentary on each of its provisions, see Dr Jadesola O. Akande, Introduction to the Constitution of the Federal Republic of Nigeria, 1979, London, 1982.

## 2.4.2. The Sources of Nigerian Law

Detailed consideration of this complex topic falls outside the scope of this study.[1] Some examination of certain fundamental principles is, however necessary for a proper understanding of Nigerian law - especially as regards its relationship with English law today.

The sources of Nigerian law are four-fold:[2]

(i) English law;

(ii) Nigerian legislation;

(iii) Nigerian case law; and

(iv) Customary law:

and each must now be considered in turn.

### 2.4.2.1. English law

This topic may be further sub-divided into English legislation of direct application,[3] and English laws which have been received into Nigerian law by local enactment.[4] Prior to Nigerian independence in 1960[5], a number of 'United Kingdom Acts, Orders in Council and Letters Patent were /expressly/

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1 For further information, see A.E.W. Park, The Sources of Nigerian Law, Lagos and London, 1963; G. Ezejiofor, 'Sources of Nigerian Law', pp 1-53 and D.I.O. Ewelukwa, 'Administration of Justice', pp 54-163, in C.O. Okankwo, (ed.) Introduction to Nigerian Law, London, 1980; Obilade, The Nigerian Legal System, supra, Part 3, especially Chapters Three to Seven; A.N. Allott, New Essays in African Law, London, 1970, Chapter Two, J. Cottrell, 'An end to slavishness? A note on Alli v Okulaja', (1973) 17 Journal of African Law, pp 247-251.

2 See Ezejiofor, supra.

3 See ibid.

4 See Obilade, supra, p 69.

5 For further information, see the section on the History of Nigeria above.

extended to Nigeria as part of her law'[1], including - for example - the Bills of Sale Acts 1878 to 1891, the Copyright Act 1911, the Territorial Waters Jurisdiction Act 1878, the Carriage by Air (Parties to Convention) Order 1958 and the West African Coinage Order 1938[2]. During Nigeria's dependency, none of these could be altered by local legislation[3]. On the attainment of independence it was provided[4] that no further United Kingdom legislation should extend to Nigeria, that Nigerian legislatures could repeal or amend English statutes[5] previously extended to Nigeria, and that 'existing British Acts[6] extending to Nigeria were to continue in force until or unless /so/ repealed or amended'[7].

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1 Ezejiofor, supra, p 3. For details of the distinction between United Kingdom legislation in the colony of Lagos and in the remaining Protectorate, see p 2.

2 For further illustrations, see ibid. Those in force in 1958 and subsidiary legislation made under them have been set out in Vol. XI of the 1958 revised edition of the Laws of Nigeria.

3 See Ezejiofor, ibid.

4 By the Nigeria Independence Act 1960. For details of the changes made, see Ezejiofor, op cit, pp 3-4.

5 The word 'statutes' is used for the sake of convenience, but it should be noted - as explained above - that Orders in Council and Letters Patent are included within the United Kingdom legislation in question. For further details regarding these, see Nwabueze, Constitutional Law of the Nigerian Republic, supra, Chapter Two.

6 Again, the word 'Acts' must be taken as a term of convenience for the reason explained above.

7 Ezejiofor, supra, p 4. Thus the Bills of Sale Acts 1987-1891 continue to apply, whilst the Copyright Act 1911 no longer does so, having been repealed and replaced by the Copyright Act, no 61 of 1970. (This Act is further examined in Chapter Three).

The second major category of English law is that which applies in Nigeria through locally enacted 'reception' provisions. An example of such a provision is s 45 of the Law (Miscellaneous Provisions) Act,[1] which states:

> (1) Subject to the provisions of this section, and except in so far as other provision is made by any Federal Law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall be in force in Lagos and, so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.
>
> (2) Such Imperial laws shall be in force so far only as the limits of local jurisdiction and local circumstances shall permit and subject to any Federal law.
>
> (3) For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.'

Substantially the same reception provision is to be found in the legislation of the various states,[2] except that the Law of England (Application) Law[3] of the former Western Region, does not apply any English statutes[4] and the High

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1 Originally known as the Interpretation Act, its name was changed by s 28 of the Interpretation Act No. 1 of 1964.

2 See the Law (Miscellaneous Provisions) Law, Lagos State, Cap 65 (Laws of Lagos State, 1973); the High Court Law, Lagos State, Cap 52, ibid; The Law of England (Application) Law (Western States) Cap 60 (Laws of Western Region of Nigeria, 1959), and the High Court (Civil Procedure) Rules (Western States), Cap 44, ibid, Ord. 35, r.10, in force in Bendel, Ogun, Ondo and Oyo States; the High Court Law, (Northern States), Cap 49, (Laws of Northern Nigeria, 1963) ss 28, 29 and 35; and the High Court Law (Eastern States), Cap 61, (Laws of Eastern Nigeria, 1963), s 15, in force in Anambra, Cross River, Imo and Rivers States.

3 (Western States) Cap 60 (Laws of Western Region of Nigeria, 1959).

4 Obilade, op cit, p 69; and see s. 4 ibid.

Court Law[1] of the northern states does not specify that the common law received is that of England, though there is little doubt that this is what is meant.[2]

Some controversy surrounds the question whether the cut-off date (1 January, 1900) applies to English statutes alone, or to English common law and equity as well. The wording seems clearly to support the former interpretation; and, despite the contrary view expressed by Allott[3], it appears to be more generally accepted that the cut-off date does not apply to the latter category of law: and that it is the modern English common law and doctrines of equity - as they may be from time to time - which have been received in Nigeria by virtue of these provisions.[4]

This raises the important question of the extent to which English decisions on common law principles are binding upon Nigerian courts. Nigerian commentators are divided

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1 Cap 49 (Laws of Northern Nigeria, 1963).

2 See Obilade, op cit, p 70 who submits that '/h/aving regard to Nigeria's historical links with England, the term could not, without more, have been intended to mean anything other than the common law of England'.

3 Op cit .

4 See Park, op cit, pp 20-24, where the author disposes in (it is respectfully submitted) convincing fashion of the various arguments propounded by Allott in support of his interpretation. See also Ezejiofor, op cit, p 8 and Obilade, supra, p 71.

on this point[1]; but it is certainly strongly arguable that House of Lords' decisions, at least, do have binding force.[2] Accordingly, it has been suggested that the words 'of England' qualifying the common law in most reception provisions should be deleted so as to enable 'the development of a uniquely Nigerian common law and equity.'[3]

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1 Thus, Allott (in keeping with his overall view) believes that post-1900 decisions are not binding, whilst Obilade, ibid, asserts that 'the decisions of the courts of England are a mere guide to the Nigerian courts'. However, Obilade cites as authority for this proposition the case of Alli v Okulaja,(1971) 1 U.I.L.R. 72, which is open to criticism in a number of respects, as pointed out by Cottrell, op cit. On the other hand, Ezejiofor,supra, p 31 submits that Nigerian courts are bound by decisions of the House of Lords on principles of common law and equity; and so too does Park, supra, pp 62-63, who further submits that there is some authority for extending binding force to decisions of the Court of Appeal and Court of Criminal Appeal as well.

2 See Ezejiofor and Park, supra. Thus, both Ezejiofor and Park have no doubt but that House of Lords' decisions are binding on Nigerian courts. Neither particularly welcomes such a conclusion, but both believe it to be unavoidably dictated by the present wording of the reception provisions. The only limitation for which they contend is that binding force should be restricted (essentially for policy reasons) to decisions of the House of Lords alone. The reason suggested by Ezejiofor for this proposed limitation is that 'since the most authoritative statement on English law can be made only by the House of Lords, it is only those decisions that should bind the Nigerian courts': Ezejiofor, p 31. Park considers that 'it would be unduly incompatible with the status of Nigeria as an independent nation' to hold her courts bound by the decisions of subordinate courts in England': Park, p 63. The significance of these views are further examined in due course.

3 Park, ibid, p 19.

As regards statutes of general application in force in England before 1 January 1900, it is clear that these continue to apply in Nigeria - unless repealed or replaced by local legislation - and that their repeal in England itself by United Kingdom legislation passed after the cut-off date is irrelevant.[1] Some controversy surrounds the criteria for determining whether a given statute is one of 'general application' in England;[2] and it has been suggested that, at minimum, it must (in order to do so) have 'applied to all classes of the community in England'[3] at that particular point in time. Examples of statutes which have been 'pronounced by the courts to be of general application and, as such in force within /the/ jurisdiction ... /include/ the Conveyancing Act 1881,... the Statute of Frauds 1677... /and/ the Sale of Goods Act 1893.'[4]

Subsection 45(2) of the Law (Miscellaneous Provisions) Act, above, recognises - and attempts to cater for - the difficulty that not all English law[5] may be suitable for application in Nigeria, by virtue of different conditions

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1 See Ezejiofor, op cit, p 5.

2 Various judicial formulations have been attempted. See Attorney-General v John Holt & Co., (1910) 2 N.L.R. 1, per Osborne, C.J.; Lawal v Younan, /1961/ 1 All N.L.R. 245; Braithwaite v Folarin, (1938) 4 W.A.C.A.76; and Young v Abina, (1940)6 W.A.C.A.180. Although the first has been quite extensively quoted, it is open to a number of objections, as explained by Obilade, op cit, pp 72-74, and Park, op cit, pp 26-29.

3 Obilade, supra, p 74.

4 Ezejiofor, op cit, pp 5-6.

5 The sub-section refers to 'Imperial laws' and there is some controversy as to whether this refers only to statute, or extends to common law and equity as well.

in the two countries. It is thus clear, for example, that an English statute cannot apply in Nigeria if some pre-condition for its enforcement is not met; - and thus the Bankruptcy Act 1883, for example, has not been received in Nigeria, by virtue of the absence of the necessary machinery for its application[1]. It is also clear, however, that mere difficulty in the application of an English statute which satisfies the primary test[2] will not preclude its reception[3]. More difficult, however, is the question whether the 'local conditions' qualification applies also to principles of common law and equity[4]. It is submitted by Obilade that it does not[5]; and, from the wording of sub-section 45(3), it does seem clearly intended to apply to received legislation only. As for the extent of modification authorised, it is apparent that amendment should be purely formal: and should not affect the substance of the provisions.[6]

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1 See Obilade, supra, p 78.

2 ie., one that was 'of general application' and in force in England on 1 January 1900.

3 See Lawal v Younan, /1961/ 1 All N.L.R. 245.

4 See Obilade, supra, pp 79-80 and Park, op cit, pp 36-40.

5 See Obilade, ibid, p 80. Park also supports this conclusion (supra, p 38) but Allott takes the opposite viewpoint, contending that courts in Nigeria (as in any other ex-colony) must have an inherent power 'by virtue of their general duty to administer justice' to modify all English laws (including those derived from common law and equity) in order to meet local conditions.

6 See, however, Park, supra, p 33, who explains that 'judges take a strict view of the direction that the verbal alterations must be formal only, and should not affect the substance of the enactment'; and warns that the courts should be careful not to adopt too narrow an approach, as seems to have occurred in Adeoye v Adeoye, /1962/ N.R.N.L.R. 63.

Apart from these general 'reception' provisions, English statutes have also been brought into operation in Nigeria in other ways: for example, by local legislation 'incorporating by reference the provisions of an English statute as part of Nigerian law: /or/ by a local legislature re-enacting in part or in full, as part of Nigerian law, the provisions of an English statute'.[1]

The extent to which English precedent interpreting English legislation applicable in Nigeria has binding force in the country varies according to whether the legislation in question had been directly extended[2] to Nigeria, or has been received in the country (by general or specific local enactment).[3] It is submitted by Ezejiofor that English cases interpreting the former category of legislation (or, at least decisions of the House of Lords[4] in this regard) are binding on the Nigerian courts. By contrast, however, statutes received under general provisions such as s 45 of the Law (Miscellaneous Provisions) Act[5] are expressly made subject to modification to meet local conditions; and, in Ezejiofor's view, both this category of legislation - and English statutes specifically incorporated or re-enacted in local legislation - should be seen as Nigerian enactments, in relation to which English precedent is merely

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1 Ezejiofor, op cit, p 30. An example of the latter category of legislation is provided by the Defamation laws applicable in the southern states, as further explained in Chapter Six below.

2 As explained above.

3 As explained above.

4 The reasons for according special significance to the House of Lords have previously been explained.

5 See p 131 above.

persuasive.[1]

It remains to note that all received English law, as well as English legislation extended directly to Nigeria, is subject to amendment and repeal by Nigerian statute[2]; and this principle may serve as a convenient starting point for examination of this second source of Nigerian law.

## 2.4.2.2. Nigerian legislation

Following the amalgamation of Northern and Southern Nigeria in 1914[3], all... pre-existing legislation in the two former units /was/ brought together /in 1916/, revised and re-

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1 See Ezejiofor, supra, pp 31-33. He refers to the 'rule' in Trimble v Hill, (1879) 5 App. Cas. 342, where the Privy Council held that 'where a colonial legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by the Court of Appeal in England, such construction should be adopted by the courts of the colony' - but also made it clear that this rule should remain subject to local conditions. Ezejiofor submits that Nigerian independence is a sufficient 'local condition' to render the rule inapplicable. It must, however, be pointed out that Ezejiofor's conclusions are not entirely clear; and appear to reflect some ambivalance as to the binding force of English precedent in this context.

2 See Obilade, op cit, P 77, in relation to received English law. Obilade cites a number of examples of where this has occurred, either directly or by implication - through the subsequent enactment of legislation inconsistent with the earlier law.

3 See the section on the History of Nigeria, above.

enacted as "Ordinances"'.[1] In 1954, the country became a federation, with a central and three regional legislatures, subsequently increased to four in 1963, with the creation of the Mid-Western Region[2]. Enactments of the federal legislature were termed 'Ordinances'; and those of the regional legislatures were called 'Laws'. Pre-existing legislation was assigned to central and regional legislatures according to its subject matter (laws relating to items on the exclusive list, for example, being deemed to have been enacted by the federal legislature)[3]. On the attainment of independence in 1960, federal enactments were re-designated 'Acts'.[4]

Following the assumption of power by the military government in 1966, the country was divided into 12 states in the following year.[5] At the federal level, enactments of the military government were called 'Decrees', whilst at the state level they were designated 'Edicts'. Whilst the federal structure was retained, the balance of legislative power shifted significantly towards the centre, and it was expressly provided that in the event of inconsistency between a Decree and an Edict - irrespective of

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1 Ezejiofor, op cit, p 8.

2 See the History of Nigeria, above.

3 See Ezejiofor, supra, p 9. The reason was to facilitate repeal or amendment of such legislation, which could only be effected by the legislature with competence on the particular topic.

4 See Ezejiofor, ibid, who explains that - at this point in time - there were six streams of legislation - federal laws applying to the entire federation; federal laws governing the Federal Territory of Lagos; and regional laws in each of the (then) three Regions, increased to four in 1963.

5 See the History of Nigeria, above.

their subject-matter[1] - the former was to prevail.[2]

In 1976, the country was divided into 19 states[3]; and in 1979, Nigeria returned to civilian rule, under a Constitution which retains its federal structure and divides legislative power between the federal legislature (Senate and National Assembly) and the various state Houses of Assembly, in the manner explained above.[4] Enactments of the central legislature are now again termed 'Acts'[5] and state statutes are called 'Laws'[6], and this nomenclature applies also to former Decrees and Edicts of the military government.[7]

As previously pointed out, Nigerian legislation is capable of amending or repealing any principle of English law - whether this is derived either from statute or from common law. Whilst this principle is clear, it may, however, be extremely difficult in practice to ascertain the extent to which local legislation has in fact, replaced (and excluded) English law. Of particular importance in this regard is the effect on the common law of the adoption of the Criminal

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1 Thus, even if an Edict was passed on a residuary matter which (in terms of the earlier 1960 and 1963 Constitution) would have been exclusively within Regional competence, it would still be subject to abrogation by an inconsistent Decree.
2 See s 3(4), Constitution (Suspension and Modification) Decree, no 1 of 1966. The same provision was retained through subsequent constitutional amendments effected by the military government (bar, of course, the swiftly repealed decree constituting Nigeria into a unitary state).
3 See the History of Nigeria above.
4 See the section on the 1979 Constitution of Nigeria above.
5 See s 277(1), Constitution of the Federal Republic of Nigeria 1979,
6 Ibid.
7 s 274(1), ibid .

and Penal Codes, applicable in Southern and Northern Nigeria respectively.[1]

The Criminal Code was first introduced in Northern Nigeria in 1904, and was extended in 1916 to the whole country.[2] It was closely modelled on the Queensland Code[3] which, in turn, was 'based mainly (though by no means entirely) on a Criminal Code drafted by one of the most eminent English criminal lawyers, Sir James Fitzstephen in 1878, and proposed to replace the common law /in England/ but never enacted by the British Parliament.'[4]

The application of the Code in the North was severely limited until 1933 by a provision entitling 'native tribunals' (which dealt with the great majority of criminal cases) to apply 'native law and custom'[5], instead of the rules laid down by the Code. For these purposes, the highly developed Moslem Law[6] was regarded 'merely as a special variety of native law and custom'.[7] In 1933,[8]

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1 These are important not only because - as Codes - they theoretically purport to state the entire law on the matters with which they deal (and therefore pose particular problems in ascertaining the relationship between them and the prior law); but also because many of the provisions affecting the media which form the main subject of this study are derived from either the Criminal or the Penal Codes.

2 See C.O. Okonkwo (ed. ), Okonkwo and Naish on Criminal Law in Nigeria, 2nd ed., London, 1980, pp 4-5.

3 Introduced in the State of Queensland, Australia, in 1899.

4 Okonkwo and Naish, supra, p 5.

5 See s 4 of the 1904 Proclamation.

6 Moslem Law, as interpreted by the Maliki School in particular, was, of course, firmly entrenched amongst the Moslem communities in Northern Nigeria.

7 Okonkwo and Naish, op cit, p 5.

8 This was by the Criminal Code (Amendment) Ordinance, 1933, (No 56 of 1933).

following pressure for the abolition of customary criminal law, the Criminal Code Ordinance was amended to provide (in section 4) that no person could be tried or punished by any court except under the express provisions of the Code or other applicable legislation.[1] However, the effect of this amendment was open to some doubt, as other legislation of 1933, especially the Native Courts Ordinance, 'saved' customary criminal law by entitling native courts to continue to administer it (subject to certain provisions as to punishment).[2] Hopes that Mohammedan Courts would gradually assimilate the Criminal Code proved futile[3] and - in the face of mounting difficulty as to the proper ambit of the Code and customary criminal law[4] - the Northern Government set up, in 1958, a Panel of Jurists to consider the problem. As a result, the Criminal Code was, in the South, (in 1959) displaced by the Penal Code Law[5], 'based on a Code which had been working successfully in a Moslem community, namely the Code of the Sudan'.[6] This, in turn,

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1 For the full text of this provision, see Okonkwo and Naish, ibid, p 6. See also Criminal Code Ordinance, Cap 21 (1923 Laws)

2 See, ibid, pp 6-7.

3 Ibid, p 7.

4 See Gubba v Gwandu N.A., (1947) 12 W.A.C.A. 141 and the cases following it, listed by Okonkwo and Naish at p 8 n 16. The matter was settled in 1957 by the leading case of Maizabo v Sokoto N.A., /1957/ N.R.N.L.R. 133 (F.S.C.) but with considerably unsatisfactory results, as it meant that two sets of law had to be canvassed - customary criminal law, to ascertain guilt; and the Criminal Code, to ascertain sentence.

5 N.N.No 18 of 1959. The present provisions (as regards matters of state competence) are now contained in the Penal Code Law and its Schedule, (containing the Code itself), Cap 89, (Laws of Northern Nigeria, 1963), whilst matters of federal competence are contained in the Penal Code (Northern Region) Federal Provisions Act, 1960, (No. 25 of 1960).

6 Okonkwo and Naish, supra, p 9.

was modelled on the 1860 Indian Penal Code, which was based upon a draft prepared by Lord Macaulay[1]. The Northern Penal Code - though clearly derived from common law roots - also reveals strong Moslem Law influence.[2] As regards the relationship between the two Codes, it is clear that '/e/ach Code covers offences committed within the territory to which it applies and only within that territory'[3] and both Codes contain identical provisions catering for difficulties arising from various elements of an offence being committed in different areas.[4] The relationship between the Codes and English common law is, however, more difficult to establish.

A convenient starting point for discussion of this complex question is the 'well-known dictum of Bairamian, J, in Ogbuago v Police[5] : "We have in Nigeria a Criminal Code which is meant to be complete and exhaustive"'[6]. This is not intended to indicate (as would be patently false ) that the Criminal Code is the only source of criminal law in Nigeria.[7] Instead, 'what it appears to mean is that,

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1 Ibid.

2 For example, 'traditional Moslem crimes such as adultery, drinking alcohol, or insults to the modesty of a woman, are preserved'. See, ibid, p 10.

3 Ibid, p 11.

4 See, ibid. In general, the application of one Code or the other will be determined by reference to the area in which the initial act was committed.

5 (1953) 20 N.L.R. 139, discussed in further detail below.

6 Okonkwo and Naish, supra.

7 See Okonkwo and Naish, ibid., who point out that there are many other enactments creating criminal offences.

with regard to the matters dealt with by the Code, the Code is self-sufficient and subject only to the process of judicial interpretation'.[1] Thus, where a provision in the Code 'is fully comprehensive in its details',[2] the courts will be slow to add further elements to the offence as defined, as illustrated by the Privy Council decision in R v Wallace Johnson.[3] Here, as further explained below,[4] it was held that the common law requirement of an 'intention to incite to violence' could not be considered an element of the offence of sedition, as it was not included within the exhaustive definition of the crime contained in the Criminal Code of the Gold Coast Colony (which is so substantially similar to that of Nigeria, that the interpretation placed upon its provisions is highly persuasive in Nigeria as well[5]).

However, not all provisions in the Code are equally comprehensive, and 'the more laconic the section, the more the courts are driven back on English cases to assist in interpretation'.[6] For example, in s 230 of the Criminal

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1 Ibid.

2 Ibid.

3 /1940/ A.C. 231 (P.C.).

4 See Chapter Five below.

5 The interpretation of the Nigerian Criminal Code would, prima facie, be the same. The decision, and its significance for the law of sedition in Nigeria, are further analysed, in some detail, in Chapter Five.

6 Okonkwo and Naish, supra, p 15.

Code, it is an offence 'unlawfully to procure anything for anyone, knowing that it is to be used unlawfully to procure an abortion'.[1] As the Code itself gave no indication of the meaning of the word 'unlawfully', the West African Court of Appeal in R v Edgal,[2] turned for aid to the English case of R v Bourne[3], which confirms that it is 'lawful' to procure an abortion to save the mother's life. Likewise, in relation to section 516 of the Code, which deals with conspiracy but omits to define it, recourse was had to the common law for guidance in R v Nwanjoku.[4]

In other instances, the Nigerian courts appear to have ignored relevant provisions of the Code altogether, preferring to base their decisions upon the common law. This is particularly marked in relation to section 24 of the Code, which is 'the leading section in the Code on criminal responsibility'[5] - but which has 'never been discussed in any reported case'.[6] Instead, the courts have relied on the common law concept of mens rea.

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1 Ibid, p 15.

2 (1938) 4 W.A.C.A. 133.

3 [1939] 1 K.B. 687. The West African Court of Appeal had before it the report from The Times, of July 19, 1938. 'An abortion in good faith to preserve the mother's life is lawful under C.C. s. 297, a section overlooked in Edgal.' Okonkwo and Naish, supra, n 52.

4 (1937) 3 W.A.C.A. 208.

5 Okonkwo and Naish, ibid, p 16.

6 Ibid. See also n 3 above, for another example of the court overlooking a relevant provision of the Criminal Code.

It follows that - even in relation to enactments intended to be as comprehensive as the Criminal and Penal Codes - the incidence of Nigerian legislation by no means renders the common law irrelevant. The position is succinctly summarised by Park as follows:

> 'So /w/hile it is beyond dispute that Nigerian legislation can override English common law, equity and statutes, it does not automatically follow that such an enactment removes from the law any English rule on the same or a related subject. In each case it is necessary to examine the enactment and decide from its contents and the surrounding circumstances whether it was intended to supplant or merely to supplement the comparable portion of the received English law.'[1]

2.4.2.3. Nigerian Case Law

Nigerian case law is the third important source of Nigerian law; and is growing in significance as the volume of judicial decisions increases and as law reporting becomes more rapid and more comprehensive.[2] Past decisions constitute a source of law by virtue of the common law doctrine of precedent, under which - in broad principle - a court is obliged to follow the ratio decidendi[3] of the judgment of a court higher than itself in the hierarchy, unless the

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1 Park, op cit, p 50.

2 For further details regarding the system of law reporting, see Ezejiofor, op cit, pp 38-41 and Obilade, op cit, pp 136-144. An important recent innovation has been the introduction of the Constitutional Law Reports of Nigeria, which - since inception in 1981 - have reported some 150 cases, interpreting aspects of the 1979 Constitution.

3 The reason for, or principle established by, the particular judgment. For further exposition of this fundamental concept, see Obilade, ibid, pp 112-114 and Ezejiofor, ibid, pp 37-38.

earlier decision can be distinguished or arguably[1], was rendered per incuriam.[2]

Under the precedent system, the hierarchy of courts is of the utmost importance. In Nigeria, it may be presented diagrammatically as follows:

Supreme Court
of Nigeria

Federal Court
of Appeal

| State High Courts | Federal High Court | Sharia Courts of Appeal[3] | Customary Courts of Appeal[4] |
|---|---|---|---|

Magistrates' Courts and District Courts[5]

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1 See Ezejiofor, ibid, pp 33-37. He submits that lower courts should be entitled to reject a clearly erroneous decision of a higher court, so as not to perpetuate bad law. He acknowledges, however, that this is contrary to the view of the Supreme Court, expressed (per Jibowu, Ag C.J.) in Tsamiya v Bauchi N.A., /1957/ N.M.L.R. 350 at 352. Objection to a lower court refusing to follow a decision given per incuriam by a higher court was also strongly voiced by Thompson, J in Board of Customs and Excise v Bolarinwa, /1968/ N.M.L.R. 350 at 352.

2 See Ezejiofor, ibid, p 33, who explains that a decision 'is said to be reached per incuriam if it was given in ignorance of a statute or a rule having statutory effect, such as a rule of court, which would have affected the decision if the court had been aware of it'.

3 All states are given the option of establishing Sharia Courts of Appeal under s 240 of the Constitution of 1979. Even before this, there were Sharia Courts of Appeal in each of the northern states.

4 All states are given the option of establishing Customary Courts of Appeal under s 245 of the Constitution of 1979.

5 The District Courts mentioned here are district courts of the northern states. See Obilade, supra, p 116 n 2.

In addition to the above, there are also other specialised courts, such as the National Industrial Court[1], the Courts of Resolution[2] and the Code of Conduct Tribunal[3], to which different rules apply; and which lie outside the scope of this study.

The Supreme Court of Nigeria[4] has original jurisdiction in disputes between States or between the Federation and a State[5] and appellate jurisdiction 'to hear and determine appeals from the Federal Court of Appeal[6]'. It is the highest court in Nigeria[7] and its decisions 'are binding on all other courts to which the common law doctrine of binding precedent applies'[8]. Its own past decisions are

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1 Appeal from this court lies directly to the Supreme Court of Nigeria. See Obilade, ibid, p 116; and for further detail regarding its composition and functions, see Obilade, pp 220-222.

2 Provision is made for courts of resolution in the ten northern states in which sharia law applies; and their function is to resolve conflicts of jurisdiction between the High Court and the Sharia Court of Appeal. However, '/n/o occassion has ever arisen for the convening of any of the Courts of Resolution'. See Obilade, ibid, p 183.

3 The Code of Conduct Tribunal is a recent innovation, having been introduced under the 1979 Constitution, as described above. Appeal from the Tribunal lies to the Federal Court of Appeal. See s 20(4), Schedule Five.

4 For details of the composition and quorum of the court, see Nwabueze, The Presidential Constitution of Nigeria, supra, pp 300-301.

5 See s 212, Constitution of the Federal Republic of Nigeria, 1979.

6 See, s 213, ibid.

7 This has been the position since 1963 when appeal to the Judicial Committee of the Privy Council was abolished. The status of Privy Council decisions prior to that date is further considered below.

8 Obilade, op cit, p 123. The doctrine of precedent does not apply in customary or sharia courts, as further explained at p 154 below.

not binding upon it, but will normally be followed unless there is strong reason for departing from them: for example, the fact that the earlier decision was given per incuriam. Further, in Johnson v Lawanson,[1] the Supreme Court confirmed that it will reverse its previous decision if the earlier ruling 'would perpetuate uncertainty in the law and cause hardship to the individual'.[2]

The Federal Court of Appeal[3] has appellate jurisdiction 'to hear and determine appeals from the Federal High Court, /State/ High Court/s/, Sharia Court/s/ of Appeal... and Customary Court/s/ of Appeal'[4] The court is the second highest in the country and it binds all State High Courts as well as the Federal High Court[5] . In turn, it is bound by decisions of the Supreme Court, but is 'free to choose between two or more conflicting decisions of the Supreme Court'[6]. Its own past decisions are not binding, but

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1 /1971/ 1 All N.L.R. 56.

2 Ezejiofor, op cit, p 18. The decision is also significant for confirming that the Supreme Court is entitled to treat pre-1963 Privy Council decisions in the same way as its own; and this aspect of the case is discussed further below. The decision is discussed at some length by Obilade, supra, pp 123-126; who criticises the sufficiency of the reasons advanced by the Court for overruling its previous decisions.

3 For details of the composition and quorum (in sharia and other cases) of the court, see Nwabueze, supra, p 301.

4 s 219, Constitution, supra.

5 It does not, of course, bind sharia and customary courts, which are not subject to the precedent system, as explained below.

6 Ezejiofor, supra, p 19, citing Oliko and others v Okonkwo, (unreported) FCA/B/3/77, delivered at Benin on October 27, 1977. The extent to which it is bound by the decisions of courts no longer part of the hierarchy - the Privy Council and West African Court of Appeal - is considered further below.

should not lightly be overturned; and it has been suggested that the court should follow the guide-lines established by the English Court of Appeal in Young v Bristol Aeroplane Co Ltd[1], and adopted by the West African Court of Appeal[2] in Osumanu v Seidu[3]. This approach would not entitle the Court to depart from decisions it merely considered inequitable; and it has been further suggested that (in criminal cases, at least) it should be given the power to do so to prevent the perpetuation of injustice.[4]

The Federal High Court[5] is essentially the erstwhile Federal Revenue Court, established by decree in 1973[6]. It has original civil and criminal jurisdiction in matters relating to federal revenue; company taxation and company law in general[7]; customs and excise duties; banking[8]; foreign exchange, currency or other fiscal measures; copyright, patents, designs, trade marks and merchandise marks; and admiralty cases.[9]. It also has appellate jurisdiction in

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1 [1944] K.B. 718. The criteria laid down by the Court of Appeal are reproduced by Ezejiofor, op cit, p 19, n 98.

2 The status of the West African Court of Appeal in the hierarchy of Nigerian courts is further described below.

3 (1949) 12 W.A.C.A. 437.

4 See Ezejiofor, supra, p 20, citing the dictum of Lord Goddard, C.J., in R v Taylor [1950] K 2 K.B.368 at 371. Criminal cases seem to call for special treatment because they have such direct impact on the liberty of the subject.

5 For the composition of the court, see ss 228 and 231, Constitution, supra.

6 See Nwabueze, op cit, p 299.

7 For further details see s 7(1)(2)(b)(i) and (c)(i), of the Federal Revenue Court Act 1973, (No 13 of 1973), reproduced by Obilade, op cit, p 186.

8 In Jammal Steel Structures Ltd v African Continental Bank Ltd [1973] 1 All N.L.R. (Part 2) 208; (1973) 11 S.C.77, the Supreme Court held that 'banking did not include ordinary 'banker-customer transactions'.

9 See s 7(1)(2) Federal Revenue Court Act, supra.

relation to decisions of Appeal Commissioners (under Companies and Personal Income Taxes Acts[1]); of the Board of Customs and Excise; and of Magistrates' courts in respect of civil or criminal causes or matters transferred to such courts.[2]

The Federal High Court is bound by the decisions of the Supreme Court and Federal Court of Appeal[3]. Since other State High Courts have no jurisdiction in respect of the matters entrusted to it for adjudication, the question of State High Courts being bound by its decisions cannot arise.[4] However, insofar as cases may be transferred to magistrates' courts in the manner explained above, the previous decisions of the Federal High Court are binding on these lower courts.[5] As regards its own past decisions, it is submitted (in keeping with general principle) that the Federal High Court should be slow to overturn its earlier rulings, but may do so where a prior decision was given per incuriam and (arguably) in criminal cases where the previous ruling was clearly unjust.[6]

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1 See s 27 , ibid

2 See 27(c), ibid. Generally State High Courts have no jurisdiction on matters for which the Federal High Court has been given responsibility. However, a State High Court may transfer such a matter to a magistrate's court for hearing if this would be more expeditious, and appeal will then lie from that court directly to the Federal High Court by virtue of this provision. See Nwabueze, op cit, pp 299-301.

3 The extent to which the court is also bound by the decisions of higher courts no longer part of the Nigerian hierarchy is considered further at p. 154.

4 Interestingly enough, neither Ezejiofor, op cit, nor Obilade op cit, give specific attention to the doctrine of precedent as it applies to the Federal High Court (or, as it was at the time of their writing, the Federal Revenue Court). Accordingly, this and the following propositions are submitted on the basis of general principle.

5 Ibid.

6 Ibid.

The State High Courts[1] have - in general - unlimited original civil and criminal jurisdiction,[2] though in certain instances their jurisdiction is excluded or restricted.[3] They also have appellate jurisdiction to hear and determine appeals 'from magistrates' courts, district courts and some customary and area courts within /their/ area/s/ of authority'.[4] They also have power to 'exercise supervisory jurisdiction over inferior courts by orders of mandamus, prohibition and certiorari'.[5]

All the High Courts are bound by the Supreme Court of Nigeria

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1 For the establishment and composition of the State High Courts, see ss 234, 235 and s 238, Constitution, supra. In general, a State High Court is constituted by a single judge.

2 See s 236, ibid. Original jurisdiction to determine whether any person has been validly elected to any office, or whether the term of office of any person has ceased is further conferred on State High Courts by s 237, ibid.

3 Thus, for example, the High Courts have no jurisdiction in disputes between states or between the Federation and a state; or, as noted above, in relation to matters reserved to the Federal High Court. For further details of instances where jurisdiction is excluded, see Ezejiofor, supra, p 122. Jurisdiction may also be restricted in a number of ways. For example, under s 259, supra, a High Court may be obliged to refer a question relating to the interpretation of the Constitution and which 'involves a substantial question of law' to the Federal Court of Appeal.

4 Ezejiofor, supra, p 123. Detailed consideration of the provisions for appeal lies outside the scope of this study, but further information can be obtained from Ezejiofor, ibid et seq. and Obilade, supra, pp 188-192.

5 Obilade, ibid, p 191, who further explains the nature of these orders in brief outline.

and the Federal Court of Appeal[1]. When interpreting State law, the High Court of a particular state 'does not form part of the hierarchy of courts for any other state',[2] and its decisions are not binding on the courts of any other state. When interpreting federal law, however, or principles of common law and equity,[3] state High Courts bind 'all magistrates' courts in the country and all district courts in the northern states.'[4]

When constituted by a single judge, a High Court's decision is not binding on any other High Court, in accordance with the practice of the High Court of England[5] as clarified by Lord Goddard in Police Authority for Huddersfield v Watson.[6] It is submitted that this is so irrespective of whether the single judge is exercising original or appellate jurisdict-

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1 The extent to which they are also bound by the decisions of other courts, no longer part of the Nigerian hierarchy, is considered further below.

2 Obilade, op cit, p 129.

3 All these types of law apply throughout Nigeria, as opposed to state laws which apply only within the geographical area of the state itself. It is submitted, however, that an interpretation by one State High Court of a state law substantially the same as the law of another state, will be of persuasive authority in the latter. This is undoubtedly desirable in the interests of uniformity.

4 Obilade, supra, p 129.

5 See Obilade, ibid, p 130, who points out that '/t/he various local High Court enactments which receive the English rules of practice provide that the practice of the local High Courts is to be in substantial conformity with the practice of the High Court of England.'

6 /1947/ K.B. 842, at 848. Here Lord Goddard emphasises that a judge 'is not bound to follow the decision of a judge of equal jurisdiction.'

ion[1]. When, however, a state High Court is constituted by two or more judges,[2] it may be equated with a Divisional Court of the High Court of England, so that its decision binds a single judge[3] and should be followed by itself in future except in the circumstances enumerated in Young v Bristol Aeroplane Co.[4] A single judge is not bound by any of his own previous decisions.[5]

Magistrates' and District courts[6] are divided into different grades and have original civil and criminal jurisdiction limited, in general, by the amount of the sum in dispute or by the nature of punishment that may be imposed.[7] Magistrates' courts have certain appellate jurisdiction in relation to customary courts. Both types of court are bound by the decisions of all higher courts in accordance with the rules discussed above.[9] Their own decisions, however are not reported[10] and are not binding in any way.[11]

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1 See Obilade, supra, p 131 n 64, who contends that Agbalaya v Bello /1960/ L.L.R. 109 must accordingly be considered as wrongly decided. Here the Lagos High Court held that a decision of the court given in the exercise of its appellate jurisdiction is binding on the court when sitting as a court of first instance. However, if the 'appeal' court were constituted by a single judge, this would contradict the principle established in Police Authority for Huddersfield v Watson, supra.

2 For examples of legislation providing for this, see Obilade, supra, p 131 n 65.

3 See Obilade, ibid, p 132.

4 /1944/ K.B. 718, noted also above. Whether this submission has been accepted by Nigerian courts is open to some doubt, however. See Ezejiofor, op cit, pp 23-24.

5 See Obilade, supra, p 132.

6 District Courts are to be found in the northern states.

7 For further detail, see Obilade, op cit, pp 192-206; and Ezejiofor, op cit, pp 102-113.

8 See Ezejiofor, ibid, p 95.

9 The binding force of decisions of courts no longer part of the Nigerian hierarchy is considered further below.

10 See Obilade, supra, p 133.

11 Ibid.

Courts applying customary and sharia law (including the Sharia and Customary Courts of Appeal) are not subject to the precedent system.[1] Accordingly, their own decisions are not binding on other courts, nor are they obliged to follow the decisions of the Supreme Court of Nigeria nor the Federal Court of Appeal[2]. It is submitted, however, that 'by virtue of the appellate system'[3], the Sharia and Customary Courts of Appeal should follow the decisions of these highest courts in Nigeria.

It remains to consider the position of courts which once - but now no longer - formed part of the Nigerian hierarchy. Until 1963, when Nigeria became a Republic within the Commonwealth,[4] appeal lay from the Nigerian Supreme Court to the Judicial Committee of the Privy Council, whose opinions-in cases emanating from Nigeria - were binding on all courts in the country, including the Supreme Court. Since 1963, however, the Supreme Court 'has taken the place of the Privy Council as the highest court of Nigeria... /and/ regards

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1 See Ezejiofor, supra, pp 16-17 and Obilade, ibid, p 133.

2 See Ezejiofor, ibid, p 18, who points out that this is somewhat anomalous, but is nevertheless the present law.

3 See Obilade, supra, p 134, who does not - however - explain why the mere fact that appeal lies to the Federal Court of Appeal (and hence to the Supreme Court of Nigeria) from the Sharia Courts of Appeal (see s 223, Constitution, supra) and from the Customary Courts of Appeal (see s 224, ibid) should, in itself, be sufficient to bring the system of precedent into operation in relation to these courts.

4 See the section on the History of Nigeria, above.

the latter as co-ordinate with itself'[1]. The Supreme Court has, accordingly, in Johnson v Lawanson[2], 'overruled a decision of the Privy Council in circumstances where it would overrule its own.'[3] Privy Council decisions on Nigerian law remain binding, however, on all other courts.[4]

The position as regards the West African Court of Appeal is more complex. This court was given jurisdiction in relation to Nigeria in 1933[5] and, from it, appeals lay directly to the Privy Council. Appeals to the West African Court of Appeal from Nigeria ceased in 1954, when the Supreme Court was created.[6] Until the abolition of appeals from Nigeria to the Privy Council in 1963, the Supreme Court accordingly had co-ordinate jurisdiction with the West African Court of Appeal and was entitled to treat its decisions as it would its own. Since 1963, however, the Supreme Court has enjoyed a status higher than that ever enjoyed by the West African

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1 Ezejiofor, op cit, p 27.

2 /1971/ 1 All N.L.R. 56. Detailed consideration of the Supreme Courts' reasons for overruling the earlier Privy Council decision lie outside the scope of this study, but may be gleaned from Obilade, op cit, pp 123-125. In essence, it seemed that the Court considered that perpetuation of the rule would create confusion and injustice. It is also interesting to note that the Court believed the earlier decision to have been given per incuriam - but did not canvass the question whether this, in itself, would entitle it to refuse to follow it.

3 Ezejiofor, supra.

4 See Obilade, supra, p. 128 and p. 133. This, of course, is only in relation to those courts in which the precedent system applies.

5 The Court had been established earlier in 1928 - and heard appeals from the Gold Coast, Gambia and Sierra Leone, as well. See Ewelukwa, 'Administration of Justice', op cit, pp 79 - 80.

6 See Ezejiofor, supra, p 27.

Court of Appeal (whose decisions always remained subject to appeal by the Privy Council) and it therefore seems appropriate that the Supreme Court should now regard decisions of the West African Court of Appeal as having subordinate status to its own[1]. The Federal Court of Appeal must now be regarded as having jurisdiction co-ordinate with that of the West African Court of Appeal; and is therefore entitled to treat its decisions in the same way as its own.[2] Decisions of the West African Court of Appeal on Nigerian law continue to bind all courts lower in the hierarchy.[3]

The Western Court of Appeal, established in 1963 for the Western Region[4] and brought into operation in 1967[5] heard appeals from the former Western Region (excluding the Mid-West[6]) and subsequently, from the Ogun, Ondo and Oyo States.[7] It was

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1 See Ezejiofor, ibid, p 28, who cites, furthermore, a number of cases in which the Supreme Court has had no hesitation at all in overruling decisions of the West African Court of Appeal - thus confirming that it considers it a court of subordinate jurisdiction.

2 See Obilade, supra, p 128. He further points out that the Federal Court of Appeal is also entitled to treat decisions of the former Federal Supreme Court in the same way as its own.

3 See Obilade, ibid, p 133. Again, this principle must be read as being limited in ambit to those courts in which the doctrine of precedent is applied.

4 By s 52, Western Constitution of 1963. See Ewelukwa, op cit p 134.

5 By the Court of Appeal (Commencement of Provisions) Notice 1967 and the Court of Appeal Act of 1967. It was deemed to have come into being on 1 April, 1967. See Ewelukwa, ibid.

6 For further information regarding the creation of the Mid-West Region, see the section on the History of Nigeria, above.

7 In 1967, the former Regions were divided into twelve states, as explained in the section on the History of Nigeria above. The Western States were as above.

abolished in 1976[1]. Its jurisdiction must be regarded as co-ordinate with the present Federal Court of Appeal, established for the whole country in the same year.[2]

It remains to consider whether the decisions of other English courts have binding force in Nigeria. This difficult question has previously been briefly alluded to[3], but now requires more detailed examination. In attempting this, it is important - first of all - to distinguish between English cases interpreting principles of common law and equity; and those dealing with English legislation. It is proposed to concentrate first on the former category of decision.

It may be recalled[4] that Nigeria has received 'the common law of England and the doctrines of equity' under s 45 of the Law (Miscellaneous Provisions) Act[5] and its various state counterparts[6]. It has been contended by Allott[7] that the principles so received are limited to those which were in force in England on the 1st day of January 1900.[8] However, it seems clear from the wording of the statute that this

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1 By s 3(1), Constitution (Amendment) (No 2) Act, no 42 of 1976.

2 By the Federal Court of Appeal Act, no 43 of 1976.

3 See p 133 above, especially notes 1 and 2.

4 See p 131 above.

5 Previously known as the Interpretation Act, as explained above.

6 See p 131 n 2.

7 Op cit.

8 This, of course is the date referred to in the Law (Miscellaneous Provisions) Act, supra.

cut-off date applies to English statutes alone; and this is certainly the interpretation accepted by the majority of commentators.[1]. If, however, Professor Allott were correct in his initial contention, there would, of course, be considerable cogency in his further submission that decisions of the English courts, from the High Court to the House of Lords[2], dating from before 1900, are binding on all Nigerian courts, whereas those after the 'cut-off date' are persuasive only (though entitled to the highest respect)[3]. Accepting, however, that the cut-off date does not apply to common law and equity (as must surely be the correct interpretation), the matter becomes considerably more complex. Nigeria has received 'the common law of England' without limitation as to time: and it is crucial to determine whether present-day decisions of the English courts[4] interpreting the common law are automatically binding in Nigeria.

Obilade trenchantly asserts that all English decisions - whether of the House of Lords or not - are persuasive only in Nigeria. He points out that '/n/o English court forms

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1 See p 132 n 4.

2 Allott, despite the dictum, of Lord Dunedin in Robins v National Trust Co, /1927/ A.C. 515 (P.C.), suggesting that only House of Lords' decisions on English law are binding on colonial courts, submits that there is ground for contending that decisions of the Court of Appeal, Court of Criminal Appeal and High Court are also of binding force - and that the latter submission is undoubtedly in keeping with general practice in Africa.

3 Allott further adds the caveat that if the common law has subsequently been modified by statute, then subsequent decisions would not even be persuasive.

4 The question is posed in general terms at this point, and an attempt will later be made to distinguish between decisions of the various English courts.

part of any Nigerian court hierarchy[1] and concludes, therefore, 'that no Nigerian court is bound by a decision of any English court under the doctrine'[2] of precedent. As regards the problem posed by the reception statutes, he brushes this aside by stating:

> '/T/he local law-reception enactments nowhere provide that the Nigerian courts are to apply the common law of England or the English doctrines of equity as stated by the English courts. Nigerian courts are to apply rules which in their opinion constitute the correct rules of the common law or of equity, not necessarily rules stated as common law or equity rules by any particular English court. A Nigerian court may state that the correct common law or equity rule on a particular matter is that stated in the decision of a lower English court which has been overruled by the House of Lords.'[3]

This, with respect, cannot be correct in principle. Nigeria has received the common law of England; and it is beyond question that House of Lords' pronouncements on the common law have ultimate and overriding authority.

Obilade further cites with approval the decision of the High Court of the Western State in Alli v Okulaja[4] in which Beckley, J. asserted that:

> '/T/his court can/not/ be held bound by /a/ decision of the Court of Appeal of England, this country now being an independent sovereign state, but judgement of an eminent Judge like Lord Justice Denning (sic), Master of the Rolls, would certainly be of the most persuasive authority and would be followed except where the court feels otherwise strongly about the ratio decidendi of the decision.'[5]

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1 Obilade, op cit, p 134.

2 Ibid.

3 Ibid.

4 (1971) 1 U.I.L.R. 72.

5 Ibid, at 77.

However, Obilade fails to take into account the criticisms which have been levelled[1] against this judgment - which (much as it may reflect an understandably popular viewpoint in Nigeria) is difficult to reconcile with clear statutory provisions. In the circumstances of the case, these included not only the Law (Miscellaneous Provisions) Act[2], but also - since the matter in issue was a procedural one - the High Court of Lagos Law[3] which states that 'the jurisdiction of the court shall be exercised in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England.'[4] Under English rules of practice and precedure, any decision of the Court of Appeal would undoubtedly be considered binding upon a High Court in England: and should therefore (in principle) have been considered binding by the Nigerian High Court as well. The reason given by Beckley, J. for refusing to regard himself as bound by the Court of Appeal - the fact that Nigeria is now an independent state - is irrelevant in the light of these statutory provisions.

In summary, therefore, attractive as Obilade's submission may be to those who wish Nigeria to develop her own unique system of law, it is difficult to support his conclusion in principle in the light of the 'reception' statutes as presently framed.

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1 See Cottrell, op cit.

2 Ms. Cottrell refers to this under its former name, the Interpretation Act.

3 See s. 12, High Court Law, Cap 52 (Lagos Laws, 1973).

4 See Cottrell , supra, p 248.

A fundamentally different view of the binding force of English decisions is taken by Park.[1] He submits that:

> 'As long as the Nigerian courts are directed to apply the common law and equity "of England", the conclusion is inescapable that they must be bound by decisions of at least some of the English courts.'[2]

In his view, the decisions of a single judge at first instance or of a Divisional Court are persuasive only, whilst decisions of the House of Lords are 'the conclusive expositions of English law'[3], so that it is not 'open to the Nigerian courts to depart from them.'[4]

The status of decisions of the Court of Appeal and Court of Criminal Appeal is more doubtful, however. He points out that the Privy Council has, in Trimble v Hill[5], ruled that colonial courts should follow Court of Appeal decisions in order to promote uniformity in the interpretation of English law throughout the Empire. This contrasts sharply, however, with a later dictum of the Judicial Committee in Robins v National Trust Company[6], indicating that only House of Lords' decisions have binding effect on colonial courts, since the House of Lords alone, is the 'supreme tribunal to settle English law'.[7] Park suggests that the latter viewpoint is more in keeping with Nigeria's status as an independent nation,

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1 Op cit.
2 Ibid, p 62.
3 Ibid.
4 Ibid.
5 (1879) 5 App. Cas. 342 (P.C.) (New South Wales).
6 /1927/ A.C. 515 (P.C.) (Ontario).
7 Ibid.

and concludes, accordingly, that 'the only English decisions binding in Nigeria are those of the House of Lords';[1] and that this is so irrespective of the status of the Nigerian court hearing the particular case.[2]

Essentially the same view is taken by Ezejiofor[3] who agrees that House of Lords' decisions are binding[4] (and accordingly disapproves the statement by Thompson, J., in Akinsemoyin v Akinsemoyin[5], 'that he was not bound by a decision of the House of Lords on an issue involving a principle of equity'[6]). He goes further than Park, however, in suggesting that House of Lords' decisions are not always binding and that 'if a decision of the House of Lords is manifestly wrong the Supreme Court should feel free to modify or ignore such a decision';[7] and submits that this course should be taken , for example, where 'an erroneous decison of the House remains uncorrected

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1 Park, supra, p 63.

2 See Park, ibid, pp 63-64. Accordingly, he would agree with Beckley, J's conclusion in Alli v Okulaja, supra, that the decision of the Court of Appeal was not binding on the High Court, but for very different reasons.

3 Op cit.

4 Ibid, p 31. In essence, he too appears to believe that so long as the reception statutes refer to the common law and equity of England, the courts are obliged to apply the "real" English law: ie, English law as interpreted by its most authoritative tribunal, the House of Lords. The decisions of lower English courst are not binding in Nigeria, in his view, as they lack final authority.

5 Suit No AB/54/70 (High Court of Western State) (unreported). See, ibid, n 59. It is interesting to note that Thompson, J. apparently believed that House of Lords' decisions, as well as those of the Privy Council, ceased to be binding in 1963. Ezejiofor points out that this is misconceived.

6 See Ezejiofor, supra, p 31.

7 Ibid.

because of the now discarded rule according to which the court cannot overrule its previous decisions'.[1] Attractive as this proposition may be, it is difficult to reconcile with principle. If decisions of the House of Lords are binding - as seems indeed the only tenable conclusion on the present terms of the reception statutes - then that concludes the matter: unless (possibly) the House of Lords' decision was given per incuriam.[2]

So far, discussion has been confined to English decisions interpreting principles of common law and equity. Some consideration must also be given to English decisions interpreting English legislation. In this regard, it is submitted that Ezejiofor - as previously discussed - is correct in distinguishing between English legislation of direct application in Nigeria[3]; and that which has been received into the country, either by general enactments such as the Law (Miscellaneous Provisons) Act or by specific local legislation. Ezejiofor submits that the former category of legislation comprises 'unalloyed enactments of the United Kingdom Parliament'[4]; and that, accordingly, English decisions interpreting their provisions should be binding in Nigeria to the same extent as decisions on the common law or equity. By contrast,

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1 Ibid.

2 See p 146 above, where it is suggested that lower courts may be entitled to depart from decisions manifestly given per incuriam - overlooking, for example, relevant statute or other binding precedent. This submission should be accepted in order to prevent the perpetuation of bad law.

3 See p 136 above.

4 Ezejiofor, op cit, p 31.

the latter category of legislation (even though identical in terms, in many instances, to English legislation), is essentially Nigerian: and English cases interpreting equivalent provisions in United Kingdom legislation should be considered persuasive only.[1] There is some force in this argument, but it is somewhat difficult to accept in relation to one particular category of English statute - viz., 'statutes of general application that were in force in England on the 1st day of January, 1900'. These statutes, as previously discussed[2], are received in Nigeria under, inter alia, the Law (Miscellaneous Provisions) Act, in the same way as the common law and equity of England. It seems, therefore, in principle, that English decisions interpreting these particular statutes should indeed be entitled to the same status as English decisions on common law and equity. On the other hand, it is also true - as pointed out by Ezejiofor - that these statutes are received subject to modification appropriate to meet local conditions (a qualification which does not apply to principles of common law and equity[3]); and there is some cogency in his further submission that the attainment of independence in Nigeria is a sufficient 'local condition' to free Nigerian courts from rigid adherence to interpretations adopted by the English courts.[4]

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1 See ibid.

2 See p 131 above.

3 See p 135 above. This seems apparent on the clear wording of the statute, but is not accepted by Allott, as earlier indicated, who believes that Nigerian courts must be free to modify common law and equity as well in order properly to fulfill their role of dispensing justice.

4 See Ezejiofor, supra, p 32.

In summary, then, it appears that decisions of the House of Lords interpreting English principles of common law and equity are indeed binding on all Nigerian courts - and will remain so until such time as the various reception statutes are amended to delete reference to the common law and equity of England. It is further submitted that this amendment should now be made, so as to enable and to encourage the development of a uniquely Nigerian system. It is futher submitted (as will be discussed at some length below) that this is particularly important in relation to the laws governing freedom of expression; for English courts in many instances have continued to adopt a narrow approach to this fundamental right - whilst other jurisdictions, notably that of the United States of America - are far more liberal in attitude. It is suggested - and will be further advocated in the course of this study - that Nigerian courts should move away from English precedent in favour of the more freedom-oriented approach of the United States; and the first step in this direction must plainly consist in the repeal of the provisions which give binding force in Nigeria to decisions of the House of Lords.

### 2.4.2.3. Customary Law

It remains to examine in brief outline the fourth - and

perhaps the most important[1] - source of Nigerian law. 'Customary law consists of customs accepted by members of a community as binding upon them'.[2] In Nigeria, it falls into two broad categories[3] - ethnic customary law, which varies widely from community to community and is still largely unwritten;[4] and Moslem law, which applies to members of the faith, and is to be found 'principally in written form... /in/ the Holy Koran, the practice of the Prophet (the sunna), the consensus of scholars, and analogical deductions from the Holy Koran and from the practice of the prophet.'[5] It is termed either 'Islamic Law' or 'the Shari'a' (the sacred law of Islam): and the 'version... in force in Nigeria is Moslem Law of the Maliki School'.[6]

The courts are, in general, 'directed to observe and enforce the observance of native law and custom, but only if the

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1 It is submitted that customary law is far more generally known amongst Nigeria's 80 million or so inhabitants; and still exerts a far greater influence on the day-to-day life of the majority than law derived from the sources considered above. However, this study is concerned with laws of colonial and post-independence origin, affecting freedom of expression in Nigeria; and customary law accordingly falls outside its ambit.

2 Obilade, op cit, p 83.

3 See Obilade, ibid.

4 Ezejiofor, op cit, p 42. He points out that the Anambra Ministry of Justice has recently published a Customary Law Manual recording the customary law of Anambra and Imo states.

5 Obilade, supra, p 83.

6 Obilade, ibid.

particular rule is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force.'[1] A further qualification is added by the Evidence Act, to the effect that a custom 'shall not be enforced as law if it is contrary to public policy'.[2]

A customary rule which is 'repugnant to natural justice, equity and good conscience' is void. No hard and fast test has been developed by the courts in this regard, each rule being treated on its merits as occasion arises. An example of a rule held void was one entitling 'the former owner of a slave to administer the latter's personal property on his death'.[3]

The criterion that the rule in question must not be contrary to public policy is less often invoked[4] as, in general, the first and third qualifications are sufficient to dispose of the matter.

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1 Ezejiofor, op cit, p 43, n 3, citing, for example, the High Court of Lagos Law, Cap 52, s 27(1).

2 See 14(3). In addition, the rule must be 'in accordance with natural justice, equity and good conscience' - essentially the same as the first requirement under the High Court legislation above.

3 See Ezejiofor, supra, pp 43-44.

4 It was, however, invoked in Cole v Akinyele (1960) 5 F.S.C. 84. Here the alleged customary law rule was considered contrary to public policy because the acceptance that a child of parents not married to each other could be legitimated by acknowledgement of paternity might have had the effect of encouraging promiscuity.

Some doubt attaches, as regards the principle that customary law must not be incompatible with any 'law', as to whether the word 'law' comprises 'received English rules of common law and equity as well as statutes'.[1] The matter has not yet conclusively been resolved by the courts,[2] but Ezejiofor submits that the word should be interpreted to mean '"any local enactment"'.[3] He further points out that '/t/his criterion has brought about considerable modifications in the rules of customary law' [4]; and has, for example, limited the amount payable by way of dowry to ₦60.00.[5] The most significant local enactment in this regard is perhaps the principle - which has now become incorporated in the Constitution - that:

> '/A/ person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law'.[6]

The only exception made is in relation to the unwritten law of contempt of court (as further discussed below[7]). For

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1 Ezejiofor, supra, p 45.

2 See for example, Malomo v Olusola, (1954) 21 N.L.R. 1; (1955) 15 W.A.C.A. 12, discussed by Ezejiofor, op cit, p 45, who points out that final determination of the point was unnecessary on the particular facts of the case.

3 Ezejiofor, ibid, p 46.

4 Ezejiofor, ibid.

5 See ibid.

6 See s 33(12) Constitution of the Federation of Nigeria, 1979, replacing earlier constitutional guarantees in this regard. This followed the decision taken at the 1958 Constitutional Conference (discussed above) to abolish customary criminal law in Nigeria altogether. See Okonkwo and Naish, op cit, p 10.

7 See Chapter Eight below.

the rest, the 'effect of this rule /was/ to abolish virtually all customary law offences'.[1]

Further analysis[2] of customary law lies outside the scope of this study. So, too, does more detailed examination of the structure of the Nigerian courts.[3] Instead, having thus outlined both Nigeria's history and its general legal system, it is now proposed to move closer to the main object of this study; and to focus attention on a topic of vital importance in this regard: the Nigerian scheme for the protection of fundamental rights and freedoms in general - and freedom of expression in particular.

## 2.5. The Nigerian Bill of Rights

The Nigerian Bill of Rights is of major importance in this study, as it incorporates a guarantee of freedom of expression which provides a significant yardstick for the assessment of the constitutionality of the many laws which govern the media in the country. Some understanding of the Bill as a whole and of the scheme provided for its enforcement is accordingly essential: and it is proposed to canvass these issues in brief outline, before proceeding to analyse the terms of the guarantee of freedom of expression itself.

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1 Ezejiofor, supra, p 46.

2 For further information, see Ezejiofor, ibid, pp 46-53; Obilade, supra, Chapter Six; and Park, op cit, Chapters Five to Nine.

3 For detailed expositions, see Obilade, ibid, Chapter Ten and Ewelukwa, 'Administration of Justice', supra, pp 54-163.

## 2.5.1. The Incorporation and Development of the Bill of Rights

The idea of incorporating a Bill of Rights into the Nigerian Constitution was first mooted at the Constitutional Conference of 1953[1] and was prompted by 'the unpleasant experience of the A.G.[2] leaders and those of the N.E.P.U. in their attempt to organise support for their parties in the Northern Region, which was then an exclusive preserve of the N.P.C.[3], the ruling party in the region'.[4] At the 1954 Conference,[5] 'two memoranda... /were submitted/ from minorities who demanded to be constituted into separate states'[6]; and when the Conference reconvened in 1957, it was decided to establish a Minorities Commission, with the following terms of reference:

> '(1) to ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears, whether well or ill-founded;
>
> (2) to advise what safeguards should be included for this purpose in the Constitution of Nigeria.
>
> (3) if, but only if, no other solution seem/ed/ to the Commission to meet the case, then as a last resort to make detailed recommendations for the creation of one or more new states.'[7]

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1 See the History of Nigeria, above.

2 See the History of Nigeria, above for a brief description of this party.

3 See the History of Nigeria, above, for a brief description of this party.

4 M.I. Jegede, 'The Supreme Court's Attitude towards some Aspects of Individual Freedom and the Right to Property', in A.S. Kasunmu, (ed.) The Supreme Court of Nigeria, Ibadan, 1977, pp 107-132, p 110.

5 See the History of Nigeria, above.

6 Odumosu, Nigerian Constitution: History and Development, supra, p 241.

7 See the Report of the Minorities Commission, ('Willinck Report'), Cmnd. 505, 1958, pp 1-2.

Having toured Nigeria and 'received evidence and representations from individuals and parties in addition to the Federal and Regional Governments'[1], the Commission reported[2] back to the Constitutional Conference convened in 1958. The Commission found that there were minorities with fears of majority domination in each of the regions and were satisfied that the solution did not lie in the creation of more states[3] as '/t/hat step in itself would create further minorities and there would be no end to the process'.[4] Instead, in addition to specific proposals relating to the police and the creation of certain 'special' and 'minority' areas,[5] the Commission recommended that minority fears be met through the introduction of guarantees of fundamental human rights in the Nigerian Constitution. It stated:

> 'Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them, but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights'.[6]

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1 Odumosu, supra, p 125.

2 See the Willinck Report, supra.

3 This is hardly surprising, given the Commission's terms of reference, as described above, which made it clear that the creation of new states was only to be recommended in the very last resort.

4 Odumosu, op cit, p 242.

5 See, ibid, pp 242-243.

6 Willinck Report, supra, p 97.

The Bill of Rights introduced into Nigerian law in 1959 pursuant to this recommendation (the terms of which are further considered below) broke new ground in the development of law within the Commonwealth. Britain itself set little store by such provisions,[1] believing - in essence - that the common law provided effective remedies which were more important than abstract declarations of principle. This attitude was reflected also in the constitutions of the older members of the Commonwealth, such as Canada[2] and Australia[3]. 'Malaya was the first Commonwealth country to receive from Britain a Constitution in which fundamental rights are provided in some detail',[4]

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1 The attitude of the United Kingdom to the introduction of an entrenched bill of rights has been canvassed by, inter alia, Michael Zander, A Bill of Rights?, 2nd ed., London, 1979. Notwithstanding her ratification of the European Convention on Human Rights of 1950, Britain still seems to have a somewhat ambivalent attitude towards an entrenched Bill of Rights, seeming to believe, in broad outline, that this is unnecessary in the United Kingdom, as English law already provides effective remedies (which are far more important than resounding (but empty) declarations of principle) : and that the introduction of a Bill of Rights would create more difficulties than its benefits would warrant. See, however, Leslie Scarman, English Law - The New Dimension, London, 1974, who points to the new pressures facing law and society and submits that a Bill of Rights may now be needed.

2 A Bill of Rights was first enacted in Canada in 1960.

3 The Australian Constitution contains no formal bill of rights. See Odumosu, op. cit, p 245.

4 Odumosu, ibid, p 245. The United Kingdom had earlier, in 1930, accepted the recommendations of the Simon Commission that no fundamental rights should be written into the Indian Constitution; and a Bill of Rights was introduced in India only in 1950, after the attainment of independence.

but the Nigerian Bill of Rights went considerably further 'by spelling out fundamental human rights in an elaborate fashion'[1]. Since its introduction, the Nigerian Bill of Rights has provided a model for a great number of the new states within the Commonwealth, which have adopted guarantees of fundamental rights closely paralleling those of Nigeria.[2]

In terms, the Nigerian Bill of Rights is based upon the provisions of the European Convention on Human Rights of 1950, to which the British Government had previously adhered on behalf of Nigeria, but which required local enactment to acquire binding force.[3] The rights guaranteed were enshrined in Chapter III of the 1960 Independence Constitution and were repeated, without substantive modification, in Chapter III of the 1963 Constitution, adopted when Nigeria became an independent republic within the Commonwealth.[4] On the assumption of power by the military government in 1966[5], it passed the Constitution (Suspension and Modification) Decree[6] which suspended a number of provisions of the 1963 Constitution (particularly those relating to the legislature and executive) but not the guarantees of fundamental rights[7]. However, the Decree also provided[8]

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1 Odumosu, op cit, p 245.

2 James S. Read, Seminar address given at the Institute of Advanced Legal Studies, London, March, 1982.

3 See Odumosu, supra, p 244; and Order in Council, S.I. 1959, 1172.

4 See the History of Nigeria, above.

5 See the History of Nigeria, above.

6 No. 1 of 1966.

7 Nwabueze, A Constitutional History of Nigeria, supra, p 217.

8 See s 6, supra.

that 'No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria'; and this provision was repeated in a number of decrees which prima facie contravened the Bill of Rights, but could not - accordingly - be ruled unconstitutional by the courts.[1] In 1970, the supremacy of the military government over the constitution was made express in the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970[2] which declared 'that what was saved or preserved from the 1963 Constitution remained in operation only by the permission and at the sufferance of the F.M.G.'[3]. The 1963 Constitution (subject to substantially the same suspensions and modifications as had been effected under the first military decree of 1966[4]) did, however, continue in force, as re-affirmed in the Constitution (Basic Provisions) Decree[5] enacted after the third

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1 See Nwabueze, supra, p 217. He cites a number of examples of such decrees: decrees providing for the arrest and detention of named persons, for the dissolution of named associations, authorising restrictions on the circulation of newspapers, prohibiting the formation of political parties, etc.

2 Decree No 28 of 1970. This was passed in response to the Lakanmi case, noted above, in the section on the History of Nigeria. Detailed analysis of this case and of the significance of the notorious Decree No 28 lies outside the scope of this study, especially as this is now principally of academic interest following Nigeria's return to civilian rule. For further information, see A. Ojo, 'Public Law, the Military Government and the Supreme Court', in Kasunmu (ed.) The Supreme Court of Nigeria, p 90-106. See also Nwabueze, supra, Chapter Seven, especially pp 170-174.

3 Nwabueze, ibid, p 205.

4 See p 173 above.

5 No. 32 of 1975.

coup on 29 July of that year[1] - but always subject to the supremacy of the military government's decrees. Even under these restrictions, however, the Bill of Rights was by no means rendered nugatory. It continued to operate 'as a limitation upon executive action in cases where its application had not been expressly excluded in relation to a particular decree';[2] and could also still be used to measure the constitutionality of the law of the pre-military era.[3]

In terms, the Bill of Rights remained precisely the same throughout the period of military rule. With the prospect of return to civilian government, however, a Constitutional Drafting Committee (the C.D.C.') was established to draft a new constitution for the country and, in the course of so doing, recommended a number of changes to the Bill of Rights. Apart from changes to the guarantee of freedom of expression - considered further below[4] - the C.D.C. recommended that the guarantee of personal liberty be strengthened;[5] that the right to fair hearing be modified to oblige those exercising

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1 See Nwabueze, supra.

2 Nwabueze, ibid, p 218, emphasis supplied.

3 The courts' power of judicial review was ousted only in relation to legislation of the military government - not as regards pre-existing laws.

4 See p 210 below.

5 Report of the Constitution Drafting Committee, 1976, para. 4.4, p xviii.

administrative functions[1] and hearing chieftaincy questions[2] to observe the rules of natural justice and to enable legal representation in customary and area courts;[3] that further limitations be imposed on the assumption and exercise of emergency powers;[4] and that illegitimate children should not be subject to disabilities.[5] These[6] and other changes have been introduced in the 1979 Constitution, which incorporates the Bill of Rights in Chapter IV. Thus, by way of further illustration, the right to privacy is now guaranteed,[7] as is freedom from sex discrimination[8], whilst guarantees of property rights have been revised to take into account the new Land Use Act, 1978[9]. Further examination of the detailed provisions of the Bill of Rights lies outside the scope of this study[10]; and it is instead proposed to focus now on the general constitutional scheme for the protection and enforcement of the guaranteed rights.

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1 Ibid, para 4.5-1, p xvii.

2 Ibid, para 4.6, p xvii.

3 Ibid, para 4.5-2, p xvii.

4 Ibid, para 4.7, p xviii.

5 Ibid, para 4.8, p xviii.

6 The provision incorporated on the last point is considerably more ambiguous than that recommended by the C.D.C. See Read, 'The New Constitution of Nigeria', supra, p 149.

7 s 34, Constitution of the Federal Republic of Nigeria, 1979.

8 s 39(1), ibid. See Read, supra, who points out that '/t/he potential impact of this provision especially on personal laws, including customary laws, in Nigeria could be considerable'.

9 s 40, ibid, and see Read, ibid.

10 For further information, see Read, ibid, pp 148-150, Nwabueze, The Presidential Constitution of Nigeria, supra, especially Chapters 22-27, and A.S. Fadlalla, 'Fundamental Rights and the Nigerian Draft Constitution', (1977) 10 V.R.U. pp 543-553.

## 2.5.2. The General Scheme for the Enforcement of the Bill of Rights

The general scheme for the enforcement of the Nigerian Bill of Rights rests on four fundamental principles: entrenchment of the Bill so that it cannot easily be amended; the justiciability and supremacy of its provisions; the right of access to the courts to obtain relief against its infringement; and the independence of the judiciary to whom the task of its interpretation and enforcement is entrusted. Each of these aspects of the general enforcement scheme must now briefly be examined.

### 2.5.2.1. The Entrenchment of the Bill of Rights

The first point to note is that the guarantees contained within the Bill of Rights are entrenched provisions of the Constitution. Thus, under section 9(3):

> 'An Act of the National Assembly for the purpose of altering the provisions of /section 9(3) itself/... or Chapter IV of /the/ Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the States'.[1]

It needs no emphasis that so high a standard of approval will not easily be met, especially as the requisite percentage must be based on the number of members of each

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[1] s 9(3), Constitution, supra.

House provided by the Constitution, irrespective of any vacancies that exist in fact.[1] Accordingly, the Bill of Rights cannot lightly be set aside or changed: and this is a vital factor in the protection it provides.

## 2.5.2.2. The Justiciability and Supremacy of the Bill of Rights

The second important safeguard lies in the justiciability and supremacy of the Bill of Rights. The first important provision in this regard is s 6(6) of the Constitution, which makes it clear that the Fundamental Objectives and Directive Principles of State Policy[2] are not justiciable,[3] but includes no such caveat in relation to the Bill of Rights. On the contrary, it affirms, instead, that the Nigerian courts have full power to determine all legal disputes which may arise: whether these are between private parties, or between the individual and the state.[4]

The second vital provision in establishing the justiciability of the Bill or Rights (as well as the crucial machinery for obtaining access to the courts, as further explained below[5]) is s 42 of the Constitution. This provides:

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1 s 9(4), ibid.

2 The content of these has previously been discussed at p 114 above.

3 Thus, s 6(c), Constitution of the Federal Republic of Nigeria 1979, provides that the authority of the courts shall not extend to any issue or question as to whether any act or omission by any authority or person, or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II.

4 Thus s 6(b) declares that judicial powers [of the courts] shall extend to all matters between persons, or between governments or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

5 See p 180 below.

'(1) Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any rights to which the person who makes the application may be entitled under this Chapter'.[1]

Also of significance in this regard is section 259 of the Constitution which provides, in broad outline, for 'any question as to the interpretation or application of this Constitution' which arises in any proceedings and involves 'a substantial question of law' to be referred to a higher court for its decision.[2]

As regards the supremacy of the Bill of Rights, this is provided by section 1 of the Constitution, which applies to the provisions of the Constitution in general: including, therefore, the guarantees of fundamental rights in Chapter IV. Its most important provisions are subsections (1) and (3) which provide as follows:

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1 s 42(1), Constitution, supra.

2 See s 259, ibid. Thus, for example, if the question arises in the High Court, which considers that it involves a substantial question of law, the Court may, (and must if any party so requests) refer the question to the Federal Court of Appeal for decision. The High Court must then dispose of the case in accordance with the latter's ruling.

'(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria;[1]...

(3) If any law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.[2]

This provision thus makes it clear that any law which is inconsistent with the guarantees enshrined within the Bill of Rights is pro tanto void. It needs no emphasis that this is of the utmost importance in guarding against erosion of the freedoms thus protected: and that it is this provision primarily which enables the Bill of Rights to be used as a yardstick for assessing the validity of laws which seem to encroach upon its guarantees.

2.5.2.3. The Right of Access to Court

The most important provision in this regard (though s 259 above also has significance) is s 42 of the Constitution, the terms of which have previously been reproduced in full and will not be reiterated here. The provision is especially significant in conferring a right of access to court for the sole and specific purpose of obtaining clarification and redress of the provisions of the Bill of Rights. The section also has the great advantage of conferring unrestricted latitude on the courts in deciding what type of

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1 s 1(1), ibid.

2 s 1(3), ibid.

order should be made. Thus, it seems that the courts have power not only to order damages or an injunction or to issue a declaration - but may also invoke the remedies of certiorari[1], prohibition and mandamus[2]. Moreover, not only may the courts adopt either category of relief, they may also issue a combination of both in the same action, thus eliminating the common law 'wall of demarcation'[3] between the two.

The procedure to be followed in applying to court under s 42 is now laid down by the Fundamental Rights (Enforcement) Rules 1979, which 'permit application to be made

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1 See Nwabueze, The Presidential Constitution of Nigeria, supra, p 356. Nwabueze suggests, however, that the courts may only grant certiorari in circumstances in which this could, historically, be done: ie., where there is a duty to act judicially. It should therefore be noted that this duty does not always apply; and that, accordingly, the ordinary administrative decision of an official cannot be the subject of certiorari: as confirmed in Arzika v Governor, Northern Region, [1961] 1 All N.L.R. 379, where the High Court refused certiorari in relation to an order for the removal of a native chief made by the Governor of the Northern Region, on the ground that the Governor's decision had been primarily one of policy; and that he was therefore not obliged to act judicially in making the order for removal. Nwabueze accordingly submits that this may provide some limitation to the relief obtainable under s 42. See ibid, pp 355 - 356.

2 See Nwabueze, ibid.

3 See, ibid, p 354, where Nwabueze emphasises the importance of this innovation.

either by notice of motion or originating summons'[1]. One complicating factor, however, (now introduced under the 1979 Rules) is the need to obtain prior leave to apply to court in this way. The application for leave is made ex parte, and must be brought within twelve months of the date of the matter or action complained of, unless an extension of time is granted.[2] The imposition of the requirement for leave is somewhat disturbing; and its validity is open to some doubt, as it seems highly questionable whether 'leave of the court or judge can /legitimately/ be attached as a condition for the exercise of a right (ie., the right to apply to the court for the enforcement of a fundamental right) which the Constitution itself guarantees, unless leave is to be granted as a matter of course with no discretion... to refuse it'.[3]

## 2.5.2.4. The Independence of the Judiciary

One further aspect of the general scheme for the enforcement of the Bill of Rights remains to be considered. As previously noted, the Bill is entrenched and justiciable - and the judiciary has a vital role to play in ensuring that it is not undermined by the other branches of government. To perform this role adequately, the independence of the judiciary must be ensured: and the Constitution attempts

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1 Ibid, p 353.

2 Nwabueze, ibid, pp 353-354.

3 Ibid, p 354.

to secure this by laying down strict conditions regarding the removal from office of judges. Thus section 256 provides, in general, that a judicial officer may only be dismissed for ' inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct'.[1] In addition, the Chief Justice may only be removed by the President, 'acting on an address supported by /a/ two-thirds majority of the Senate';[2] whilst the Chief Judge of the High Court of a state, the Grand Kadi of a Sharia Court of Appeal or the President of a Customary Court of Appeal may be removed only by the Governor 'acting on an address supported by /a/ two-thirds majority of the House of Assembly of the State'.[3] In all other cases, the President (or Governor) may act only on the recommendation of the Federal (or State) Judicial Service Commission[4].

The significance of this latter requirement lies in the fact that the Judicial Service Commissions are essentially independent bodies. Thus, the Federal Judicial Service Commission, for example, is composed of the Chief Justice of Nigeria, as Chairman, the President of the Federal Court of Appeal, the Attorney-General of the Federation, two persons (who have been qualified to practise as legal practitioners in Nigeria for not less than 15 years) from

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1 See s 256(1)(a) and (b), Constitution, supra.

2 s 256(1)(a)(i), ibid.

3 s 256(1)(a)(ii), ibid.

4 s 256(1)(b), ibid.

a list of four recommended by the Nigeria Bar Association, plus two 'other persons, not being legal practitioners, who in the opinion of the President are of unquestionable integrity'.[1]

Thus, it is clear that a judge in Nigeria cannot arbitrarily be dismissed from office at the whim of the executive; and therefore need not fear this in giving a ruling upholding the fundamental rights and contrary to the presumed wish of the other branches of government.

Judicial independence is protected not only in this way, but also by the manner of appointment to the bench. Again, this does not depend on executive wish alone. Instead, all judicial appointments (except that of the Chief Justice of Nigeria who is appointed by the President in his discretion but subject to the confirmation by simple majority of the Senate[2]) are made on the advice or recommendation of the appropriate Judicial Service Commission (either Federal or State). In addition, the appointment of the President of the Federal Court of Appeal, of the Chief Judges of the State High Courts, of the Grand Kadis of Sharia Courts of Appeal and of the Presidents of Customary Courts of Appeal require legislative endorsement.[3]

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1 See s 7(e), Third Schedule, ibid.

2 s 211(1), ibid.

3 See ss. 211, 217, 218, 229, 235, 240 and 246, ibid.

Thus, in this way too, the independence of the judiciary is promoted by guarding against 'political' appointments to the bench.

## 2.5.3. The Two Categories of Rights Contained Within the Bill

Within the Bill of Rights as a whole, a clear distinction is drawn between two categories of fundamental liberties. The first category is stated in terms which are "relatively" absolute, in the sense that, in general, the rights thus protected are subject to derogation only in the circumstances specifically enummerated in each guarantee.[1] Thus, for example, s 31 of the Constitution guarantees that 'no person shall be compelled to perform forced or compulsory labour',[2] but then further qualifies this declaration by explaining that 'forced or compulsory labour' does not include 'any labour required in consequence of the sentence or order of a court'.[3] As regards this category, however, the rights to life and personal liberty are "unusual" in that they are subject - in addition to derogations expressly mentioned in the sections which proclaim the right to both[4] - to further (and unspecified) derogation, during a period of emergency, through 'measures reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency.'[5]

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1 The rights to life and liberty are subject to additional derogation, as further explained in the text below.

2 s 31(1)(b), Constitution, supra.

3 s 31(2)(a), ibid.

4 The sections in question are ss. 30 and 32, ibid.

5 s 41(2), ibid, and see also p 190 below.

By contrast, the rights included within the second category, are "qualified"; and may validly be curtailed by laws 'reasonably justifiable in a democratic society'[1] in order to protect or promote a number of recognised interests such as 'public order', 'public safety' and 'public morality'.[2]

The first category includes the rights to life, dignity of the human person, personal liberty, fair hearing, freedom from discrimination and (in broad outline) compensation for property compulsorily acquired.[3] The ambit of these rights is, as explained above, subject to certain limitations as expressly provided by the guarantees themselves[4]; but no further derogation is permitted, save in a state of emergency when further exceptions to the rights to life and personal liberty may be permitted, as further explained in due course.[5]

The second category of rights includes the rights to 'private and family life', 'freedom of thought, conscience and religion',

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1 The meaning of this important phrase is considered further below.

2 The nature of these recognised interests and the extent to which derogation is authorised in order to uphold them will be examined, with specific reference to freedom of expression, in the general course of this study.

3 See ss. 30, 31, 32, 33, 39 and 40, Constitution, supra.

4 See, for example, s 30(1), ibid, which qualifies the right to life by the proviso that a person may intentionally be put to death 'in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria'.

5 See p 190 below.

'freedom of expression and the press', 'peaceful assembly and association' and 'freedom of movement'.[1] These rights are likewise subject to derogation in terms of the specific provision which confers each right. Thus, for example, the right to freedom of movement may legitimately be circumscribed by a law 'imposing restrictions on the... movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria'.[2]

In addition (and this clearly divides this second category of rights from those earlier discussed), these "qualified" rights are subject to additional limitation in terms of s 41 of the Constitution (irrespective of whether any emergency is in force). Thus, s 41(1) authorises derogation from these rights by any law that:

> 'is reasonably justifiable in a democratic society -
>
> (a) in the interest of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the rights and freedoms of other persons'.[3]

The way in which these guarantees and their authorised derogations have been (and should be) interpreted by the courts is of the utmost importance; but, before turning to this vital question, some consideration should be given

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1 See ss 34, 35, 36, 37 and 38, Constitution, supra.

2 s 38(2)(a), ibid.

3 s 41(1), ibid.

to the effect of a declaration of emergency on the guaranteed rights: for the experience of the First Republic graphically reveals how important this may be in practice.[1]

## 2.5.4. The Declaration of Emergency and its Effect on the Guaranteed Rights

The circumstances in which an emergency may be declared have been more rigorously defined under the 1979 Constitution - in keeping with the recommendation of the Constitution Drafting Committee in this regard.[2] The matter is governed by section 265 which is clearly aimed at circumscribing both the assumption and duration of emergency powers to a greater degree than obtained during the era of the First Republic.[3] The President is accordingly empowered to declare a state of emergency only in seven specified circumstances - viz., in time of war; when the Federation is in imminent danger of invasion or involvement in war; when public order and safety have broken down to an extent requiring 'extraordinary measures to restore peace and security' [4]; when there is a 'clear and present danger'[5] of such breakdown in public order and safety;

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1 See the section on the history of Nigeria, where the declaration of emergency in the West and its ramifications for Nigeria's further difficulties are described.

2 Report of the Constitution Drafting Committee, para. 6.7. p xxiii.

3 The framers of the 1979 Constitution were clearly concerned to guard against a recurrence of events such as those which occured in western Nigeria in 1962.

4 See s 265(3)(c), Constitution, supra.

5 See s 265(3)(d), ibid. It is interesting to note the use of this phrase, usually associated with the jurisprudence of the United States' Supreme Court in the context of fundamental rights. The origin and ambit of the 'clear and present danger' doctrine in this context is further described below.

when imminent danger of a disaster or natural calamity threatens the community; when 'there is any other public danger which clearly constitutes a threat to the existence of the Federation'[1]; and when a State Governor requests the declaration of a state of emergency in his State. The circumstances in which such a request may be made are prescribed by section 265(4) which provides that the Governor's action must be supported by a two-thirds majority of all members of the State House of Assembly: and that there must be a 'breakdown in public order and safety (or the danger thereof) or an imminent danger of disaster confined to the State'[2]. If such circumstances exist, and the Governor fails to request the declaration of an emergency within a reasonable time, the President may act on his own initiative. The President's declaration must, however, in all cases be confirmed by resolution (passed by two-thirds majority of all members) of each Federal House; and this must be done within two days (or ten days if the National Assembly is not in session at the time).[3] Any proclamation of emergency expires after six months, unless extended by similar resolutions for a further six months.[4] The National Assembly may end the proclamation at any time 'by a simple majority of all the members of each House'.[5]

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1 See s 265(3)(f), ibid. This presumably encompasses any threat of secession, as occured in 1967 with the declaration of independence by Biafra (as discussed above). The provision is, however, broad enough to cover a multiplicity of situations; and seems disturbingly wide.

2 Read, op cit, p 150.

3 See s 265(6)(b), supra.

4 See s 265(6)(c), ibid. It seems that successive resolutions may be passed extending the proclamation for a further six months on each occasion.

5 See s 265(6)(d), ibid.

As for the effect of a declaration of emergency on the freedoms guaranteed by Chapter IV, express mention is made in the Constitution of only two rights: the rights to life and personal liberty. During a period of emergency (declared in accordance with the provisions described above), both these rights are subject to further derogation, on the following conditions:

(i) the measures taken must be limited to those 'reasonably justifiable for the purpose of dealing with the situation that exists during the period of emergency'[1] and

(ii) the right to life may only be limited 'in respect of death resulting from acts of war'.[2]

It should be noted that the Constitution expressly provides that all retrospective penal legislation - even in a period of emergency - is prohibited.[3]

No further specific mention of the effect of a declaration of emergency on the guaranteed rights is made, but it seems clear that this circumstance would affect the determination of whether particular laws (aimed at promoting 'public order' and 'public safety') were indeed reasonably justifiable in a democratic society.

The interpretation of this important phrase remains to be considered, but before doing so, it should be placed in context by brief reference to a doctrine frequently (and,

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1 s 41(2), ibid.

2 s 41(2), proviso, ibid.

3 s 41(2), read with s 33(8), ibid.

it is submitted, unfortunately) invoked in the interpretation of laws prima facie inconsistent with the guaranteed rights: viz., the doctrine of constitutionality.

## 2.5.5. The Doctrine of Constitutionality

According to this doctrine, or 'presumption of constitutionality', legislation enacted by the duly elected representatives of the people is presumed to be valid: and should not lightly be overturned by the judiciary - which is, after all, 'an unelected or oligarchic body'[1]. As declared by Chief Justice Marshall of the United States' Supreme Court:

> 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other'.[2]

The matter is even more crisply put by Mr. Justice Washington, also of the Supreme Court of the United States, in the following terms:

> 'It is but a decent respect due to the... legislative body by which any law is passed to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt'.[3]

In the United States, however, this presumption is by no means uniformaly applied. On the contrary, certain fundamental rights are considered 'preferred freedoms'; and

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1 Nwabueze, A Constitutional History of Nigeria, supra, p 28.

2 Fletcher v Peck (1819) 6 Cranch, 87, 128 , cited by Nwabueze, ibid, pp 281-282.

3 Ogden v Saunder (1827) 13 Wheat, 213, 270, cited by Nwabueze, ibid, p 282.

'where a law on its face restricts these freedoms, the court /will/ not grant it the normal presumption that laws reaching the court for its scrutiny are valid. /Instead/, /t/he government must prove that the law under question is constitutional'.[1] Thus, in the context of freedom of the press, for example, the Supreme Court has declared that 'any system of prior restraint... comes to the... Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint.'[2]

Cogent as the dicta first cited are, it is submitted that the guaranteed rights should all be recognised as "preferred freedoms", so that - far from being subject to the doctrine of constitutionality - they should instead enjoy particular protection: and any law prima facie inconsistent with them should come before the Nigerian courts 'bearing a heavy presumption against its constitutional validity'[3]. It is accordingly submitted that the onus should lie firmly on the state to prove not only that there is some rational connection between the law impugned and the particular interest[4] - such as public order - it is designed to promote;

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1 Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 11.

2 New York Times Co v United States, 403 U.S. 713 (1971).

3 See New York Times Co v United States, ibid, emphasis supplied.

4 The extent of connection which must be shown is discussed further below.

but also that the law is indeed 'reasonably justifiable in a democratic society' (as further discussed in due course). It is submitted further that Nwabueze is wrong to assert that a distinction should be drawn in this regard between 'absolute' and 'qualified' rights, only the first category being entitled to such firm eschewment of the presumption of constitutionality.[1] It is vital that the onus be placed upon the state in the manner proposed above: for otherwise there is grave danger that the substance of the rights may be drained away, leaving only empty husks.

Unfortunately, however, the Nigerian courts have tended to apply the doctrine of constitutionality in its full rigour - without regard to any potential prejudice to the guaranteed rights, as graphically demonstrated by the case of Cheranci v Cheranci[2]. Here, the validity of legislation prohibiting children of the age of 15 and under from participating in politics was challenged for inconsistency with the constitutional guarantees of freedom of expression, peaceful assembly and association (as provided by the Independence Constitution of 1960[3]). The case is noteworthy for the

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1 Thus Nwabueze, op cit, supra, p 285, submits that in relation to the qualified rights (the second category identified above), the onus should lie on the state only to the extent of showing that the law in question is connected with the recognised interest. Thereafter, the court should infer that it is indeed justifiable in that interest; and the burden should then fall upon those impugning it to show that it is not reasonably justifiable.

2 /1960/ N.R.N.L.R. 24.

3 These provisions are substantially the same as under the 1979 Constitution.

fact that the trial judge 'started from the rather questionable premise'[1] that:

'/T/here must be a presumption that a Law is constitutional and that its provisions are reasonably justifiable and necessary'.[2]

He further emphasised that the further consequence of this presumption is to 'throw the burden of proof on the person who alleges that the legislature has infringed a fundamental human right',[3] to show that this is indeed so. In the result, this burden of proof was not discharged; and the validity of the restriction was accordingly upheld.

In addition, in Arzika v Governor, Norther Region[4], it was contended by a deposed chief that an order that he leave his own area for another part of Nigeria was void for inconsistency with the constitutional guarantee of freedom of movement,[5] as was the legislation under which the order had been made. The court held, however, that:

'There is a presumption that the Legislature has acted constitutionally and that the laws which they have passed are necessary and reasonably justifiable. The same presumption must also apply where the Governor, acting, as

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1 Nwabueze, supra, p 395.

2 Cheranci v Cheranci, at 28. In adopting this premise, the court placed particular emphasis on the fact that the legislature represents the majority of the people.

3 Ibid, at 29. In the circumstances, the court did not think that the onus of proving the unconstitutionality of the law had been discharged, for the susceptibility of youth to indoctrination and the easy excitability of juveniles meant that public morality and public order could indeed be undermined by allowing their participation in politics.

4 /1961/ 1 All N.L. R. 379.

5 As provided by the 1960 Constitution, but substantially the same as the present guarantee of freedom of movement.

he is and was bound to do, upon the advice of his Executive Council, makes a legislative order in exercise of powers conferred upon him by the Legislature.'[1]

Not surprisingly, accordingly, the application for relief was rejected.

The same approach is also evidenced in a number of cases involving the media as further discussed in due course;[2] and the result is very clearly to cast an unduly heavy burden on any person who seeks to impugn the validity of laws which, prima facie, are undoubtedly at odds with the constitutional guarantees. This situation is most unfortunate, as graphically explained by Nwabueze:

> '/T/he bill of rights was meant primarily as a protection for minorities against the majority that dominated the legislature. To allow the judgment of the legislature to prevail in /cases such as Cheranci/ would be to impair the efficacy of that protection. In relation to human rights therefore the presumption of constitutionality would appear to be repugnant to the primary purpose for which those rights were guaranteed in the constitution.'[3]

It is submitted, accordingly, that the doctrine of constitutionality must be firmly rejected; and the onus placed fairly and squarely on the state to prove the validity of all laws which prima facie are inconsistent with the Bill of Rights.

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1 Arzika v Governor, Northern Region, supra, at 382.

2 See especially, Chapter Five, on sedition, and the discussion of the notorious Chike Obi case.

3 Nwabueze, op cit, supra, p 288. It is submitted that Nwabueze is correct in this assessment, and it is unfortunate that he is not prepared to cast the onus in full upon the state in relation to all the guaranteed rights, as explained at p 193 n 1, above.

## 2.5.6. The Requisite Connection Between the Law Impugned and the Recognised Interest

A further point of controversy in the interpretation of the constitutional guarantees and the validity of laws allegedly inconsistent with them is the 'kind of relationship'[1] which must exist between the impugned law and the interest (such as public order or morality) it is designed to serve. As Nwabueze points out:

> 'The Constitution itself provides no guidance on what the relationship should be, whether any kind of relationship or connection, no matter how tenuous, unsubstantial, irrational, indirect or remote, is sufficient; whether the danger to public order, public safety etc., should be clear and present or probable or merely likely'.[2]

If the decision of the Privy Council in the Antigua Times[3] case is any guide, however, it seems that the connection need not be particularly substantial. Here, the validity of legislation imposing (inter alia) an annual licence fee on newspapers (as further explained below[4]) was upheld on the basis that it constituted a tax which was reasonably required to further interests such as public order. If this approach were to be followed in Nigeria, a very tenuous connection indeed would suffice.[5]

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1 Nwabueze, ibid, p 250.

2 Ibid.

3 Attorney General v Antigua Times Ltd [1976] A.C.16 (P.C.).

4 See Chapter Four below.

5 Note, however, the contrasting approach of the Zambian Court in Patel v Attorney General for Zambia, [1968] Z.L.R. 99, where the court held that 'exchange control is [not] sufficiently proximate to public safety to warrant [exchange control] legislation being adopted in the interest of public safety'.

## 2.5.7. The Meaning of the Phrase 'Reasonably Justifiable in a Democratic Society'

A further important question is the meaning of the phrase 'reasonably justifiable in a democratic society'. This expression is found not only in the general derogation provision contained in section 41(1) but also in a number of the specific guarantees, including the guarantee of freedom of expression, as further explained below.[1] The word 'justifiable' is inherently vague: though some attempt to give it a more objective meaning is to be discerned in Cheranci v Cheranci[2] where the court stated:

> '/A/ restriction upon a fundamental human right must before it may be considered reasonably justifiable -
>
> (a) be necessary in the interest... of public morals or public order /or whatever other interest is in issue/ ; and
>
> (b) must not be excessive or out of proportion to the object which it is sought to achieve.[3]

There is also considerable controversy as to whether the notion of 'democratic society' imports certain absolute values which must be respected in any society which aspires to democracy, irrespective of its state of development. The difficulty is well illustrated by the opposing viewpoints expressed in the Zambian case of Kachasu v Attorney General for Zambia.[4] Here, Chief Justice Blagden expressed the view that 'democracy in a newly emergent nation like

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1 See the section on the guarantee of freedom of expression, esp. at p 201 below.

2 /1960/ N.R.N.L.R. 24.

3 Ibid, at 29.

4 /1967/ Z.L.R. 145.

Zambia cannot be judged by the standards of the long-established democracies'.[1] By contrast, Mr. Justice Magnus believed that:

> '/I/t is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society... /Although/ some distinction should be made between a developed society and one which is still developing... there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society'.[2]

The viewpoint of the Nigerian courts in this regard is still ambivalent, though certain decisions (especially in the context of sedition, as discussed below[3]) suggest that the courts will fairly readily accept that particular restrictions are indeed 'reasonably justifiable' in Nigeria. It will, however, be submitted, in the course of this study, that many of the laws governing the media should not be accepted as 'reasonably justifiable in a democratic society.' It is accordingly proposed to postpone further consideration of this criterion until its application in the context of freedom of expression has been noted and then to examine it more closely in relation to specified laws.[4]

The next step, accordingly, is to gain some understanding of the important provisions of Nigeria's guarantee of freedom of expression: and it is to this topic that attention must now be directed.

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1 See Nwabueze, op cit, p 251, and the judgment, supra, at 167.
2 See Nwabueze, ibid, pp 251-252.
3 See Chapter Five below.
4 Brief mention is, however, made below to the difference between this formula and that provided by the European Convention on Human Rights of 1950. See p 209 below.

## 2.6. The Guarantee of Freedom of Expression

Freedom of expression is one of a number of fundamential rights guaranteed by the Nigerian Constitution. The guarantee of this right was introduced - together with the other guarantees comprised within the Nigerian Bill of Rights - in 1959, for reasons which have previously been described and need not be repeated here.[1] Like the remainder of the Bill of Rights, its terms bear marked resemblance to those of the European Convention of Human Rights of 1950, which served as the model for the Nigerian provisions.[2] The content of the guarantee has remained substantially the same since its inception, but certain changes have now been introduced under the 1979 Constitution; and it is accordingly as well to reproduce both "old" and "new" guarantees in juxtaposition so as to point the differences between them.

### 2.6.1. The Terms of the Guarantee of Freedom of Expression

The guarantee of freedom of expression contained within the Independence Constitution of 1960[3] provided as follows:

'Freedom of expression:

24 - (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

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1 See p 171. In essence, the rationale was the protection of the numerous minorities in Nigerian society.

2 See above, at p 173 especially.

3 The Nigeria (Constitution) Order in Council 1960, (S.I. No. 1652 of 1960).

(2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) in the interest of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights, reputations and freedom of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films; or

(c) imposing restrictions upon persons holding office under the Crown, members of the armed forces of the Crown or members of a police force.'

When Nigeria became an independent republic within the Commonwealth in 1963[1], a new "Republican" Constitution[2] was adopted: but only minor consequential amendments were made to the guarantee of freedom of expression - the references to 'the Crown' in s 24(1)(c) being replaced by references to the 'state' and the 'Federation'.[3]

When Nigeria returned to civilian rule[4] in 1979, the new "Presidential"[5] Constitution came into operation. This now guarantees freedom of expression in the following terms:

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1 See the section on the History of Nigeria, above.

2 This was the Constitution of the Federation, Act no 20 of 1963.

3 The guarantee was re-numbered s 25, and the only change made in its terms was in s 25(1)(c) which referred to the 'imposing /of/ restrictions upon persons holding office under the state, members of the armed forces of the Federation or members of a police force.'

4 It will be recalled, from the discussion above, that no changes were made to the terms of the Bill of Rights during the period of military rule, although its "sphere of influence" was reduced in the manner described.

5 This is the Constitution of the Federal Republic of Nigeria, 1979.

'Right to freedom of expression and the press;

36.— (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

(b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force.'

This provision, must however, be read together with s 41 of the 1979 Constitution which states; in sub-section (1):

'Nothing in sections 34, 35, 36,[1] 37 and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society -

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons.'

Before proceeding to examine the differences between these provisions, as well as the impact on the media of a further

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[1] s 41(1), ibid, emphasis supplied.

innovation in the 1979 Constitution - the introduction of non-justiciable Fundamental Objectives and Directive Principles of State Policy[1] - some general observations regarding the guarantees are in order.

## 2.6.2. No Express Reference to the Freedom of the Press or other Media

A striking feature of the guarantee of freedom of expression in both its original and present form is that no express mention is made of freedom of the press (except, of course, in the marginal note* to the 1979 provision which does not form part of the substantive guarantee). The provision (for this, as well as other reasons - as further explained in due course) thus stands in marked contrast with the guarantees contained in other constitutions: notably that of the United States of America[2], which declares in robust terms that 'Congress shall make no law... abridging the freedom of speech, or of the press'.[3] The Nigerian guarantee is thus premised upon the notion that the freedom of expression to which it declares every person to be entitled extends also to those involved in the publication of newspapers and propagation of radio and television broadcasts.

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1 These are contained in Chapter II of the Constitution, and the reason for their introduction has previously been examined in the section on the Nigerian Constitution. The significance of these objectives and principles for the media in Nigeria is further discussed below.

2 The other principal difference between the Nigerian and United States' guarantees lies, of course, in the emphatic terms in which the latter is couched, as further emphasised at p 207 below.

3 U.S. Constitution, Amendment 1. This First Amendment was adopted in 1791. See Nelson and Teeter, Law of Mass Communications, supra, p 5.

* This is reproduced at p 201 in the form of a heading to the section.

Confirmation of this assumption - that the broadly framed guarantee of freedom of expression confers protection on those involved in the media - has been provided by the opinion of the Judicial Committee of the Privy Council in proceedings emanating from Malta: which nevertheless have significance for Nigeria because of the close similarity between the Nigerian and Maltese guarantees of freedom of expression.[1] In this case - Olivier v Buttigieg[2] - the Privy Council confirmed that a partial ban on the circulation of a weekly newspaper constituted an unlawful infringement of the editor's constitutional right to impart ideas and information without hindrance or interference.[3] The significance of the decision, for present purposes, is that the Judicial Committee reached this conclusion without questioning in any way whether the guarantee - couched in general terms - extended also to newspaper editors and others involved in the mass media. Instead the Committee

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1 This similarity is the result of the fact that the Maltese Bill of Rights, like those of many other new states in the Commonwealth, is modelled on the Nigerian Bill of Rights. See the section on the Nigerian Bill of Rights above.

2 /1966/ 3 W.L.R. 311 (P.C.).

3 The respondent was the editor of a weekly newspaper, the 'Voice of Malta', published by the Malta Labour Party. The newspaper was condemned by the Archbishop of Malta who, in a circular dated 26 May 1961, declared it to be a 'mortal sin to print, write, sell, buy, distribute or read /it/': (see ibid).
Thereafter, on 25 April 1962, the Government forbade 'the entry /into/ the various hospitals and branches of the /Medical and Health/ Department of newspapers condemned by the Church authorities' (ibid). This prohibition directly affected some 2,660 employees of the Department. The respondent challenged the constitutionality of the ban under section 14 of the Maltese Constitution (Malta(Constitution) Order in Council 1961), which guarantees freedom of expression in substantially the same terms as the Nigerian Independance Constitution. The Civil Court of Malta found in his favour; and this decision was confirmed on appeal to the Court of Appeal of Malta and, subsequently, to the Judicial Committee of the Privy Council. In their Lordships' view, the 'strict prohibition imposed by the circular, while not preventing the respondent from... imparting ideas and information /did/ "hinder" him and was an "interference" with his freedom to do so' (at 312).

tacitly assumed this to be the case; and its view (though not binding on Nigerian courts) would no doubt be considered persuasive.

Whilst it is thus clear that the Nigerian guarantee of freedom of expression extends to those involved in the media as to others in Nigeria and secures to the media the right 'to receive and impart ideas and information without interference,'[1] it may nevertheless be queried whether this is sufficient protection for the media, given the special and vital function which they perform within society. It is accordingly interesting to note that one of the major issues in the vigorous debate which preceded the enactment of the present Constitution[2] was the need asserted by the press itself - for the guarantee of freedom of expression to be amended by the introduction of a separate and explicit guarantee of freedom of the press. A number of commentators emphasised the vital role of the media in informing, educating and upholding democracy, and stressed the extent to which press freedom had been undermined since independence.[3] They thus forcefully contended that freedom of the media could not adequately be safeguarded if subsumed in a general guarantee of freedom of expression.

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1 See s 36(1), Constitution of the Federal Republic of Nigeria, 1979.

2 See the section on the History of Nigeria above.

3 The vicissitudes suffered by the press during the period of the First Republic and under the military government are further described in Chapter Three below.

Notwithstanding this cogent contention, however, the Constitution Drafting Committee decided against incorporating a specific guarantee of freedom of the press. It did so on two main grounds, the first[1] of which is particularly relevant for present purposes. The Committee thus stressed that freedom of expression should be enjoyed by everyone - not simply by those involved in the media. Hence, it would be wrong to single out editors and reporters and accord them special privileges; and the Committee accordingly concluded:

> '/T/here are no grounds for giving any Nigerian citizen a lesser right to freedom of expression than any other person or citizen who happens to be a newspaper editor or reporter'.[2]

Thus, the opportunity to include a specific guarantee of freedom of themedia was lost. It is submitted that this was unfortunate, and that the Committed adopted an unduly narrow view, failing to appreciate that a specific guarantee would not have detracted in any way from the freedom of expression enjoyed by others: and overlooking the vital importance of the role performed by the media and the concomitant need for the press to be shielded from oppression at the hands of government.[3]

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1 The second ground is examined further below.

2 Report of the Constitution Drafting Committee , 1976, Vol 1, para 4.2, p xvi.

3 It is interesting to note in this regard that the UNESCO Commission which reported on Mass Communications in 1980 (as previously explained at p 37) also saw no need for specific guarantees of protection for journalists; and that its chairman, Sean Macbride, dissented vigorously from the majority on this issue, emphasising the extent to which journalists around the world were subjected to harrassment (or worse) at the instance of various governments.

## 2.6.3. Wide-Ranging Derogation Authorised

The second striking feature of the guarantee in both its original and present form is the number of derogations it permits from the right to 'receive and impart ideas and information without interference'; and the broad terms in which these are cast. Derogation is thus authorised to prevent the disclosure of information received in confidence,[1] to maintain the authority and independence of the courts,[2] to regulate telephony, broadcasting and the exhibition of films[3], and to impose 'restrictions' (undefined) on persons holding government office[4]. It is also permitted 'in the interests of' (a phrase which is notoriously wide) 'defence, public safety, public order, public morality or public health;[5] as well as for the purpose of protecting 'the rights and freedoms of other persons'.[6] It needs little emphasis that the list of exceptions permitted is long, and that each is cast in extremely broad terms: and thus has the potential to cover a multiplicity of different situations. Particularly disturbing are the broad concepts of 'public order' and 'public safety', 'in the interests of' which derogation is authorised under s 41. The contrast in terms between the Nigerian guarantee and that of the United States is

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1 See s 36(3)(a), Constitution, supra.
2 See ibid.
3 See ibid.
4 See s 36(3)(b), ibid.
5 See s 41(1)(a), ibid.
6 See s 41(1)(b), ibid.

stark, the latter asserting in simple and emphatic terms that 'Congress shall make no law.... abridging the freedom of the press'.[1] In practice, however, the difference is more a matter of degree, as even the strongest proponents of free speech and press in the United States acknowledge that certain restrictions are required to uphold essentially the same interests as are accorded specific recognition in the Nigerian guarantee. The main distinction between the two jurisdictions is, therefore, to be found in the extent of restriction permitted in the service of these interests: and here the United States comes down firmly on the side of freedom of expression, as will be further explained in the course of this study. Thus, in essence, the Supreme Court of the United States regards free speech as a 'preferred freedom' (as previously explained[2]) so that any law which infringes this right comes before the Court bearing a heavy presumption against its constitutionality. By contrast, in Nigeria, the key criterion - as provided by the Constitution - is whether a particular law (the object of which is prima facie, to uphold a recognised interest[3]) is 'reasonably justifiable in a democratic society'.[4] If so, then the rule must be acknowledged as constitutional, even though it diminishes the guaranteed right 'to receive and impart ideas and information without interference.'

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1 United States Constitution, Amendment 1, supra, emphasis supplied.

2 See p 191 above.

3 See section 41(1)(a) and s 36(3)(a), Constitution, supra, for details of these interests (previously identified also in the text above).

4 This is the criterion specified in both s 36(3) and s 41(1) ibid.

If it cannot be so justified, however, then the law in question is void to the extent of its inconsistency with the guarantee of freedom of expression[1]. Considerable importance thus attaches to the phrase 'reasonably justifiable in a democratic society'; and this must now briefly be examined.

## 2.6.4. The Criterion: 'Reasonably justifiable in a democratic society'

This criterion provided by the Nigerian Constitution to determine the validity of a law *prima facie* inconsistent with the guarantee of freedom of expression is intrinsically vague and uncertain. The controversy as to whether the standards of a 'democratic society' are absolute or vary depending upon the degree of development of the particular nation has previously been discussed,[2] and will not be further analysed here. The 'doctrine of constitutionality' frequently invoked in applying this test has also been examined in an earlier section of this study[3]; and the warnings previously sounded as to the danger presented by this doctrine will not be reiterated. Suffice it, therefore, for present purposes to focus on the words 'reasonably justifiable'; and to contrast these with the provisions of the guarantee of freedom of expression contained in the European Convention on Human Rights, 1950, on which the Nigerian Bill of Rights

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1 See the section on the Nigerian Bill of Rights above, where the significance of inconsistency with any constitutional provision is further explained.

2 See the general discussion of the Nigerian Bill of Rights, above, especially at p 197-198.

3 See p 191 above.

is modelled[1]. Though substantially similar to the Nigerian guarantee of freedom of expression in asserting a right to the unrestricted communication of ideas and information (subject, however, to derogation in order to protect other important interests of society), the European guarantee (contained in Article 10[2]) is markedly different in declaring that derogation is permitted only to the extent that it is 'necessary' in a democratic society. It needs little emphasis that this term intrinsically imports a stricter requirement; and this prima facie impression has been strengthened by the interpretation which has been placed on the word by the European Court of Human Rights. The Court has thus ruled[3] that the term connotes 'a pressing social need'[4]; and no restriction on freedom of expression is valid under Article 10 unless it corresponds with such need. The Nigerian criterion of 'reasonably justifiable' is clearly far more flexible; and may therefore be more easy to satisfy (although it will be submitted, in the course of this study, that many of the laws which govern the media in Nigeria do not meet even this less rigorous standard).

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1 See p. 199 above.

2 The provisions of Article 10 are reproduced at pp 48-49 above.

3 See Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245, further analysed in the section on sub judice publication, in Chapter Nine below.

4 See para. 59, ibid.

## 2.6.5. The Difference between the Original and Present Guarantees

When the present guarantee (contained in s 36 of the 1979 Constitution) is read together with s 41, it is apparent that there is little substantive difference between it and the original safeguard of freedom of expression. The most striking difference lies in the specific further guarantee (first introduced in 1979) of the right to 'own, establish and operate' any medium for the dissemination of information, ideas and opinions'[1]. This is subject, however, to significant exception as regards television and wireless broadcasting stations: for which the authority of the President is required. It should be noted, however, that the requirement of Presidential consent does not apply to the State Governments - and the result has been to facilitate the establishment of separate radio and television stations in each of the 19 states. The practical significance of this is considerable (as further explained below[2]). In brief, it precludes a monopoly over broadcasting from arising - and since many of the State Governments do not support President Shagari's National Party of Nigeria[3], it means that the ordinary Nigerian citizen is provided with some

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1 s 36(2), Constitution of the Federal Republic of Nigeria, 1979.

2 See Chapter Four (on the licensing and regulation of the media), especially at p 380.

3 See the section on the History of Nigeria, where the breakdown of votes between the five political parties in the 1979 election is briefly described, at p. 110.

variety in reports and interpretations of events.[1] The requirement for consent (at the sole and unregulated discretion of the President) for the establishment of a private broadcasting station detracts in large measure from the right proclaimed by s 36(2), and is further examined in due course.[2]

## 2.6.6. The Role of the Media vis-a-vis the Fundamental Objectives

The 1979 Constitution has broken new ground in a number of ways, including the introduction - in Chapter II - of a number of non-enforceable but nevertheless significant[3] Fundamental Objectives and Directive Principles of State Policy to guide both the State and the citizen in their relations inter se. The reasons for introducing these provisions have previously been canvassed,[4] and will not be repeated here. Some further consideration of the nature

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1 The significance of this has been reduced to some extent, as further explained at p 332 below, by legislation requiring state radio broadcasting services to limit their broadcasts to the confines of the particular state. All television broadcasting stations have a limited reception area, and hence the diversity of programmes which separate state services would seem to promise is not as great as it might be. This new restriction has struck particularly hard at Radio Kaduna whose shortwave transmitters were previously able to broadcast to all Nigeria.

2 See p 338 below.

3 Even though these provisions are non-justiciable (this being recommended by the Constitution Drafting Committee on the ground that there would otherwise be constant confrontation between the judiciary and the other branches of government), this does not mean that they may not be taken into account by the courts in order to resolve ambiguities.

4 See p 113 above.

of the provisions is required, however, in order to assess the duties placed upon the media in relation to both Fundamental Objectives (the ultimate goals of Nigerian society) and Directive Principles of State Policy ('the paths which might lead to those objectives'[1]). The terms and spirit of these provisions is best appreciated by reproducing certain of the sections within the Chapter.

Thus, s 15(1) provides that:

> 'The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation; to the end that loyalty to the Nation shall override sectional loyalties';

and s 16(1) states:

> 'The State shall... control the national economy in such a way as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.'

Not all the provisions of this Chapter are so generalised, however, and thus, section 18(1), by contrast, provides that:

> 'The Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels'.

These Fundamental Objectives and Directive Principles are, of course, far removed, in strict legal terms, from the guarantee of freedom of expression itself. Nevertheless, they may have considerable significance in guiding the media in performing their important role within society and

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[1] Report of the Constitution Drafting Committee, supra, p v.

may also (if this is necessary ) be taken into account in instances where the constitutionality of a given law (in the light of the guarantee of freedom of expression) is uncertain.[1] It is therefore important to note that the media have been assigned specific responsibility in relation to the provisions of Chapter II: and s 21 thus states:

'The Press, Radio and Television and other agencies of the mass media shall at all times be free to uphold the Fundamental Objectives contained in this Chapter /ie., Chapter II/ and /to/ uphold the responsibility and accountability of the government to the people'.[2]

The media are thus encouraged to play a special role in promoting public awareness of the duties imposed upon Federal and State Governemnts in terms of the Fundamental Objectives

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1 It will be submitted in the course of this study that many laws governing the media are unconstitutional in that they are not 'reasonably justifiable in a democratic society'. If there is doubt as to this, however, then reference to the media's obligations under Chapter II may serve to buttress the contention. Thus, for example, it will be contended that the present strict liability in the civil law of defamation is unconstitutional, at least as regards public officials and figures who should be obliged (as in the United States) to prove express malice on the part of the publisher in order to succeed in any claim for damages. If there is doubt as to whether the strict liability rule is unconstitutional, then it would be salutary to bear in mind that under s 21 (as described in the text below), the media are free to uphold the responsibility of the government to the people: and this means that the media should not be liable in defamation if they publish criticism of those involved in government (unless, of course, their criticism is malicious). Thus, s 21 affords additional reason for concluding that the strict liability rule is bad; and that the law should be changed to follow the United States' pattern (as will be further explained in due course).

2 s 21, Constitution of the Federal Republic of Nigeria, 1979.

and Directive Principles - and in reminding those in positions of power that their primary responsibility is not to promote their own aggrandisement but to ensure the welfare of the people whom they represent.

## 2.6.7. Shortcomings in the Present Guarantee

In addition to the criticisms previously directed at the failure of the guarantee to make express mention of the media, at the number and width of the derogations it permits and at the inherent uncertainty of the formula 'reasonably justifiable in a democratic society', it remains to note certain other fundamental shortcomings in the present guarantee of freedom of expression. In this regard, it is salutary to refer, once again, to the debate which preceded the adoption of the "Presidential" Constitution; and to the demands for reform of the guarantee of freedom of expression then vociferously voiced by a great many Nigerian journalists. In particular, it was urged that a new provision governing press freedom should be adopted; and that it should include specific guarantees of:

- unrestricted access to information[1];
- absolute privilege against disclosure of sources of information[2];

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1 The extent to which access to information is restricted under the News Agency of Nigeria is further examined at p 263 below.

2 Interestingly enough, there are moves towards according such absolute privilege even under the terms of the present guarantee, as further described at p 1157, et seq.

- protection against detention and harassment (including forced resignation);[1]
- prohibition of the banning or closure of newspapers;[2]
- insulation against government control through ownership[3].

The extent to which media freedom has been eroded through restrictions on access to information (and so forth) is further considered in the course of study. Suffice it therefore for the present to state that there are good grounds for the concern thus expressed by representatives of the media during the course of the constitutional debate. It is accordingly disappointing to note the view of the Constitution Drafting Committee (now reflected in the limited terms of the present guarantee of freedom of expression), that the existing provision (s 25 of the Republican Constitution[4]) contained sufficient protection against banning or other restrictions. The Committee referred to the banning orders imposed on newspapers in the erstwhile Western Region during 1965[5] and indicated, in essence, that the press had only itself to blame for failure to obtain redress

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1 The record of detention and harassment of journalists is further examined at p 276 below.

2 The extent to which newspapers have been banned is described at p 251 below.

3 The present, almost universal, government ownership of the media and its significance for media freedom is further discussed at p 285 below.

4 The terms of this guarantee are the same as those in s 24 of the Independence Constitution, reproduced at p 199 above.

5 These were imposed in the course of the disturbances which attended and followed the elections of that year, as previously explained in the section on the History of Nigeria.

under the then guarantee. In the words of the Committee, 'the failure of the Press to take action against the Government to vindicate their rights in no way detracts from the efficacy of the clear provisions of the Constitution, nor can it justify the argument that additional provisions are required to protect the Press.'[1]

The attitude thus manifested by the Constitution Drafting Committee seems extremely short-sighted. It fails to take adequate account of the very real difficulties experienced by the media throughout Nigerian history[2] and overlooks the fact that the inclusion of guarantees of the kind requested (particularly as regards ownership of the media and protection against harassment and detention of journalists) would have released the Nigerian media from what are, perhaps, the most serious restraints in practice.[3] The inclusion of the specific guarantees requested would also have served to remind those in power of the importance - in the interests of society as a whole - of preserving a free flow of information, ideas and opinions; and (even if the guarantees were not always observed) they would, at

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1 Report of the Constitution Drafting Committee, supra, para 4.3., p xvi.

2 In this regard, reference is, of course, confined (with due apology) to the history of the country from the colonial period onwards; and more particularly to events in the twentieth century, for only since 1900 have the media played any significant role in Nigeria.

3 It is always difficult to quantify different types of restriction, but these two undoubtedly have had a major impact on the operation of the media in practice, as further explained in Chapter Three below.

least, by their presence in the Constitution have had the salutary effect of 'defin/inq/ beliefs widespread among democratic countries and provid/inq/ a standard to which appeal /might/ be made by those whose rights /were/ infringed.'[1]

One further vital point of introduction to Nigeria now remains to be examined: the growth to their present status of the print and electronic media within the country.

## 2.7. The Growth of the Media in Nigeria to Date

It has earlier been noted that Nigeria was one of the first countries in Africa to establish a viable newspaper.[2] Nigeria's very first newspaper was begun by missionaries in 1859 and started as a vernacular in the Yoruba language, 'but soon became Africa's first bi-lingual newspaper when English was added'.[3] The Anglo-African was founded in Lagos in 1863, but lasted for only three years[4]; and the most significant development was the establishment of the Lagos Daily News in 1925. This newspaper was not only the first daily, but also 'the first political party paper, trumpeting the calls of Macaulay's National Democratic

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1 This is, of course, to use the words of the Minorities Commission who originally recommended the adoption of the Bill of Rights as a whole for this very reason. See the section on the Nigerian Bill of Rights at p 171 above, and see also the Report of the Minorities Commission, Cmnd. 505, 1958.

2 See the section on the significance of Nigeria, at p 57.

3 Barton, op cit, 18. Called Iwe Thorin, it sold for thirty cowrie shells.

4 See Barton, ibid, who points out that it is suprising it lasted so long, as it carried material far more suitable to British readership and thus, eg., carried a series which began ('and this in fetid, humid, tropical Lagos'), 'Hills and dales were deeply sleeping beneath a well-frozen covering of snow''.

Party'[1]. This evoked the creation of a competitor[2], the Daily Times, which 'was to become the most important and easily the biggest newspaper in tropical Africa'[3] and which '/f/rom its first issue on 1 June 1926,... towered above all... others in West Africa in professionalism'.[4]

Other papers were not long in following; but the next 'major landmark in the development of the press of Africa was the appearance on the morning of 22 November 1937 of the West African Pilot, a new daily launched in Lagos by Nnamdi Azikiwe'.[5] Highly professional in its standards and production and strongly nationalistic, its circulation reached 12,000 copies a day within three years, and 'with a readership of between ten and twenty to each newspaper, its influence was phenomenal'.[6]

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1 Ibid, p 21. This was especially significant in the light of the fact that the franchise (albeit limited) had been given to residents of Lagos in 1922, as explained in the section on the history of Nigeria, above.

2 See, ibid. Barton submits that this was prompted by European (and conservative African) nervousness at the emergence of Macaulay's strongly nationalistic paper. The money needed to start the Daily Times was thus put up by white businessmen, through the Lagos Chamber of Commerce; but the paper was nevertheless 'no pussy-footing, imperialist mouthpiece' (ibid, p 22), largely as a result of the influence of its first editor, Ernest Ikoli.

3 Ibid, p 22.

4 Ibid.

5 Ibid, p 25.

6 Ibid, p 26.

Newspaper production also began to spread around the country - largely through the Associated Newspapers of Nigeria (also founded by Azikiwe and known as the Zik Group), which established the Eastern Nigerian Guardian at Port Harcourt in 1940, the Nigerian Spokesman at Onitsha in 1943 and the Southern Nigeria Defender at Warri,[1] whilst the Comet was transferred from Lagos to Kano in 1949, 'giving Nigeria's northernmost centre on the edge of the Sahara its first /ever/ daily'.[2]

A number of government-sponsored newspapers were also begun in the mid-1940s, including the English language Nigerian Citizen. A rival private group, the Amalgamated Press of Nigeria was also formed, incorporating the Daily Service and Nigerian Tribune, and (in time) 'a string of small provincial dailies'[3]; and this group became the mouthpiece of the Action Group, 'in opposition to Zik's... N.C.N.C.'[4] 'Nigeria had thus three developed newspaper chains, two serving political parties and one virtually government-run'.[5]

A further major development was the acquisition of the Daily Times by the Daily Mirror group, for this gave the paper an unprecedented boost, involving the acquisition of new presses and other plant, the employment of some of the best

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1 See, ibid, p 27.

2 Ibid.

3 Ibid, p 29.

4 Ibid. For further detail as to these political parties, see the section on the History of Nigeria, above.

5 Ibid.

journalists in the country, the establishment of '/a/ news service covering pretty well the whole of Nigeria... on a scale never attempted before or since',[1] and the development of an efficient distribution service for the first time in the history of the country.[2]

Further description of the establishment and practical operation of Nigeria's newspapers lies, unfortunately, outside the scope of a study concerned primarily with the law governing their publication.[3] The most important of the papers presently in production should, however, be noted. Today, Nigeria has over fifteen daily newspapers;[4] of which the most important are the Daily Times (and its sister paper, the Sunday Times ) with circulation figures, in 1976[5] of over 230,000 and 400,000 respectively;[6] the New Nigerian, 'one of the most serious and intellectually independent of the papers'.[7], the Tribune, 'the voice of Chief Awolowo's[8] Unity Party of Nigeria, published in Ibadan and unrestrainedly... critical ... of the ruling party';[9] the National

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1 Ibid, p 33.
2 See ibid, pp 33-34. This was through the establishment of a special bus service, still fondly remembered to the present day.
3 For further fascinating details and keen insight into the practial difficulties besetting the press in Nigeria (and in the rest of Africa), see Barton, op cit,esp., Chapters 2 & 3.
4 The Times (of London), Special Supplement on Nigeria, 3.2.1982.
5 This marks the year when both newspapers were brought under government ownership, as further explained in Chapter Three below. Since then, the papers have lost circulation: see The Times, ibid.
6 /1975-76/ Africa Contemporary Record, p B 794.
7 The Times, supra.
8 Chief Awolowo is a major figure in Nigerian politics, and founder of one of the country's earliest and most important political parties, the Action Group, as explained above in the section on the History of Nigeria.
9 The Times, supra.

Concord, established in 1980 (and now[1] also highly critical of President Shagari's government), which 'employ/s/ many of the stars of Nigerian journalism and is most intelligently produced'[2]; and finally, the Punch, one of the few independently owned papers and 'very bright and popular with scantily clad girls on page three'.[3]

In addition, there are also a number of newspapers which appeal primarily to the regions in which they are published, of which the most notable are 'the Daily Sketch of Ibadan, the Daily Star of Enugu, the Chronicle of Calabar, the Herald of Ilorin, the Observer of Benin City, the Standard of Jos, the Statesman of Owerri and the Tide of Port Harcourt'.[4]

Radio and television broadcasting have also grown immeasurably since their first small beginnings. Radio broadcasting in Nigeria began in the early 1930s when a wired wireless distribution service (piping programmes by landline to loudspeakers in subscribers' homes) was established at Lagos. The spread of the wired wireless service was slowed by the Second World War, but - by approximately 1948 - distribution centres had been established in virtually every major city.[5] Plans were then made to convert these stations into a 'fully fledged system of national and regional broadcasting[6];

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1 This newspaper was originally 'totally committed to the ruling party' - see The Times, ibid, but has now changed its stance completely, as further explained in Chapter Three.
2 Ibid.
3 See The Times, ibid; and see also /1975-76/ Africa Contemporary Record, supra.
4 The Times, ibid.
5 See Ian K. Mackay, Broadcasting in Nigeria, Ibadan, 1964, p 4.
6 Op cit, p 10.

and, by 1954, these proposals were brought to fruition and the Nigerian Broadcasting Service (the predecessor of the Federal Radio Corporation of Nigeria[1]) was established.[2] Today, in addition to the national service provided by this Corporation (known as Radio Nigeria, with headquarters in Lagos[3]), 'state broadcasting stations are operated in each of the states /and/ /t/here is also an... external service which broadcasts to Europe, Africa and the Middle East in English, French, Hausa and Arabic'.[4]

As regards television broadcasting, the former Western Region was the first to establish a television service which was not only the first in Nigeria but also the first in the continent as a whole.[5] The erstwhile Eastern Region followed suit by October 1960 and the North by April 1962.[6] The National Broadcasting Service lagged far behind the Regions in the introduction of television and commenced transmission (confined initially to Lagos) only in April

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1 The structure and functions of the Federal Radio Corporation of Nigeria (and the extent of government control over it) are further described in Chapter Four below.

2 Mackay, supra, pp 6-25. This involved the implementation of the Turner-Byron Reports and Chalmers plan, which Mackay describes in fascinating detail.

3 The Times, (of London), supra.

4 Ibid.

5 Mackay, supra, p 61. W.N.T.V., with its slogan, FIRST IN AFRICA, is thus the oldest television service operating on the continent.

6 Ibid, p 62.

1962[1].

Today, all television broadcasting services are operated by the National Television Authority[2], ('NTA') established at the end of 1975[3]. As noted above, '/c/ountry wide colour coverage is virtually complete with an N.T.A. ... Station... now in every state'.[4] Moreover, '/s/everal state governments, mainly those opposed to the present Government[5], are now also establishing their own TV stations'.[6]

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1 Mackay, pp 63-64, points out that this duplication in services - the result of Regional insistence on autonomy and the capacity to broadcast matters of particular interest to their own peoples - had, in fact, unfortunate consequences for the development of an efficient broadcasting service in Nigeria - particularly in the field of television. It meant that scarce resources of funds, equipment and skilled personnel had to be spread over four separate services - instead of being concentrated in one, and used to the best advantage of the country as a whole. Nor was there any compensating benefit in the form of an increased range of programmes - for the regions broadcast substantially the same material, merely differently slanted to reflect the interests of the particular area. For further details of the growth of the Nigerian broadcasting media, see Christopher Kolade, 'Nigeria', in Sydney W Head (ed.,), Broadcasting in Africa: A Continenal Survey of Radio and Television, Philadelphia, 1972, pp 78-89.

2 The structure and functions of the National Television Authority (and the extent of government control over it) are further discussed in Chapter Four.

3 The Times, supra.

4 Ibid.

5 The break-down of support for the ruling party amongst the different states has previously been noted at p110 above.

6 The Times, supra.

Accurate figures of the number of people having access to the different media are hard to obtain,[1] but some indication may be gleaned from Barton[2], who states that Nigeria, in 1975/76, had 11 dailies[3], 65 non-dailies, 1,280,000 radio sets and 76,000 television sets.[4] Despite the large number of newspapers, however, the printed press is not, in Barton's view, the 'true mass media'; for, in a country where '/m/illions... will live out their lives as illiterates'[5], the radio - at present at least - has the greatest significance. The importance of newspapers should not be discounted, however, for as Barton also points out, it is the print media which 'reac/h/ that relative handful of people in every /African/ state who really matter - the politicians, the urban elite, the rising tide of well-educated students, the businessmen and, possibly the most important of all, the officer corp of Africa's armies'.[6]

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1 This is not only because of the paucity of recent studies, but also because it is difficult to gauge the number of people who, in practice, may have access to a newspaper, radio, or television set acquired by a single individual.

2 Op cit.

3 The discrepancy between this number and that cited by The Times, in 1982, no doubt reflects the 'boom in newspaper growth since the return to civilian rule in 1979': The Times, supra.

4 Barton, supra, p 11.

5 Ibid, p 4. Barton here speaks in general terms of the continent's population as a whole; but the comment is equally applicable to Nigeria, specifically.

6 Ibid.

For further information regarding newspaper circulation in Nigeria, see Dayo Duyile, Media and Mass Communications in Nigeria, Ibadan, 1979, pp 62 - 63. The table provided by the author has been reproduced in Appendix II.

Against the background of this brief sketch of salient aspects of Nigerian experience, it now remains to examine the laws governing the media in this African state: and it is proposed to begin by providing a brief overview of legal and other restrictions on the media in Nigeria; and then to focus on those laws which are of particular significance.

# CHAPTER THREE

## AN OVERVIEW OF MEDIA FREEDOM IN NIGERIA

### 3.1. Introduction

The laws governing freedom of the media in Nigeria are many: and space does not permit detailed examination of all. Accordingly, it is proposed to devote this chapter to a brief overview of the principal restraints and controls affecting the media in Nigeria - before turning to detailed analysis of the laws selected for more comprehensive study.[1]

In conducting this overview, an attempt will be made (so far as practicable) to distinguish between (1) laws of 'colonial' origin (in the sense that they either form part of the body of English law received into Nigeria pursuant to the general process previously described,[2] or are contained in Nigerian legislation adopted before the attainment of independence in 1960); (2) legislation enacted during the period of the First Republic from 1960 to 1966[3]; (3) laws promulgated by the military government between 1966 and 1979; and (4) legislation introduced since the return to civilian rule. The constitutionality - in terms of the

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1 These are briefly enumerated in the following section, at p 227 below.

2 See the section on the Sources of Nigerian law, at p 131 above.

3 See the section on the History of Nigeria, at p 92, et seq.

guarantee of freedom of expression in s 36[1] - will briefly be reviewed: subject, however, to the caveat that in-depth analysis lies beyond the scope of this general overview.

An attempt will also be made to assess the impact of 'extra-legal' factors, such as the detention and harassment of journalists and the effect of large-scale government ownership of the media. Finally, the validity of the claim that Nigeria's press is the "freest" in Africa will be examined.

## 3.2. Laws of 'Colonial' Origin

It is principally the laws of 'colonial' origin (in the sense previously described) which have been selected for comprehensive study. These include registration requirements relating to newspapers, and other licensing and regulatory laws affecting the media in general, which are described in Chapter Four below.[2] Also of colonial origin is the law of sedition, described in Chapter Five; the law

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1 s 36, Constitution of the Federal Republic of Nigeria, 1979. It will be recalled from the section on the Guarantee of Freedom of Expression, that laws which are inconsistent with this guarantee (and do not fall within the ambit of one of the permitted derogations) are void, to the extent of such inconsistency, under the terms of s 1(2) of the 1979 Constitution.

2 These laws are brought together in one chapter for the sake of convenience: and because they reflect different facets of essentially similar control. It must, however, be acknowledged that this treatment does not fit altogether easily into the classification of laws described above, since the law governing the electronic media is of post-colonial origin, unlike the law regulating the print media.

of defamation (in both its civil[1] and criminal aspects) described in Chapters Six and Seven; and the law of contempt of court, which affects the media in four major respects, and is further discussed in Chapters Eight to Twelve.

Another law of colonial origin (less important by reason of its more limited ambit and the apparent paucity of instances in which it has been invoked[2]) is the provision prohibiting the publication of 'false news' which is 'likely to cause fear and alarm'; and this is briefly examined below.

### 3.2.1. The Publication of False News 'Likely to Cause Fear and Alarm'

The law against sedition[3] is reinforced by section 59 of the Criminal Code (and the equivalent section 418 of the Penal Code[4]) which renders it an offence to publish or reproduce 'any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement,

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1 The civil law of defamation, like the regulation of the media, does not fit neatly into the category of laws of 'colonial' origin in that some provisions were incorporated after independence, such as the Defamation Law 1961, applicable in Lagos State. In general, however, it is true to say that the law of defamation is 'colonial' law.

2 The decision discussed below appears to be the only reported instance of the invocation of the law: though it has also been the basis of criminal prosecution in at least two instances in 1981, as further explained below.

3 Sedition law is further discussed in Chapter Five.

4 See s 418, Penal Code (Northern Region) Federal Provisions Act 1960, no 25 of 1960.

rumour or report is false'[1]. Under sub-section 59(2), 'It /is/ no defence to a charge under /this provision/ that /the accused/ did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or report'.[2]

The relevant provision of the Penal Code (s 418) is essentially similar, and provides that '/w/hoever circulates, publishes or reproduces any statement, rumour or report which he knows or has reason to believe to be false with intent to cause or which is likely to cause fear or alarm to the public whereby any person may be induced to commit an offence against the public peace, shall be punished with imprisonment which may extend to three years or with fine or with both'[3]. Liability thus depends either on the accused's subjective intent to cause fear or alarm, or on the objective likelihood of this condition resulting. The provision is silent as to the question of onus, but it would seem - in keeping with general principles of criminal liability - that the burden lies on the prosecution to prove all elements of the offence.

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1 Section 59(1), Criminal Code, Cap 42, (Laws of the Federation of Nigeria and Lagos, 1958). The differing history and areas of application of the Criminal and Penal Codes are discussed further in Chapter Five.

2 Section 59(2), ibid.

3 Section 418, Penal Code (Northern Region) Federal Prosions Act, supra.

There appears to be only one reported case on this topic, as further discussed below. It is clear, however, that the law is by no means a dead-letter, as graphically demonstrated by recent events. Thus, in August 1981, the editor and editor-in-chief of the Nigerian Standard were charged with reproducing and publishing false information, following the publication of a front-page story in the issue of 24 July, which 'quoted charges by the Gongola State chairman of the Great Nigeria People's Party ... that the President's National People's Party ... was plotting to assassinate its political opponents in the state'[1]. Moreover, the mere fact that the law has not frequently been invoked in the past provides no guarantee that this may not occur at some time in the future[2]. These provisions are accordingly of considerable significance: and it should be noted that the burdens they place on the media are extremely onerous. Not only is it difficult to define or predict what type of statement is 'likely to cause fear and alarm' or to 'disturb the public peace', but s 59 of the Criminal Code also casts the onus upon the accused

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1 /1981/ 6 Index on Censorship, Notes. The journalists were also detained for more than 48 hours and their offices raided, as also described below in the section on the harassment of journalists, at p 281 . In addition, in December of that year, the editor and proprietors of the Sketch newspaper were summoned to appear before a Kaduna Chief Magistrate's Court over a charge of publishing a false statement. See /1982/ 1 Index on Censorship, Notes. Unfortunately, no report of either case is available.

2 Recent experience in the United Kingdom in relation to the law of criminal libel - until recently considered a 'dead-letter' - graphically demonstrates this possibility. These English cases are further discussed in Chapter Seven below.

to show that he did not know, or have reason to believe, that the statement was false; and that he took 'reasonable measures to verify /its/ accuracy'[1]. Verification is a time-consuming and therefore a costly procedure; and the proof of a 'negative' is always difficult.

The constitutionality of these provisions accordingly merits some examination. The rules (particularly with their requirement of prior verification) are prima facie in conflict with the constitutional guarantee of the right to 'receive and impart ideas and information without interference'[2]. However, the constitution also permits derogation by any law that is 'reasonably justifiable in a democratic society' for the purpose of maintaining public order[3]. The question accordingly arises whether these provisions are so 'reasonably justifiable'.

In one of the few reported decisions on this provision, R v Amalgamated Press (of Nigeria) Ltd and another[4], it was contended that section 59 was void for inconsistency with the guarantee of freedom of expression contained in section 24 of the Independence Constitution[5]. The court accorded this argument short shrift, emphasising that '/s/

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1 See p 229 above.

2 See s 36, Constitution of the Federal Republic of Nigeria, 1979.

3 See ibid, and s 41(1)(a), ibid.

4 /1961/ 1 All N.L.R. 199

5 This, of course, is the exact equivalent of section 25 of the Republican Constitution, and the close equivalent of the present guarantee, in s 36, Constitution, supra. (The terms of s 24 are set out at p 199 above).

24 ... guaranteed nothing but ordered freedom and ... /could/ not be used as a licence to spread false news likely to cause fear and alarm to the public'[1].

This ruling seems to smack of excessive judicial caution; and though it must be acknowledged that the Supreme Court did take pains to stress that it remains 'legitimate and constitutional to ... criticise the Government ... by means of fair arguments'[2], the difficulty (of course) lies in determining what is fair; and the judgment provides no guidance in this regard.

In addition, the Supreme Court failed to pay adequate attention to the heavy burden placed upon the accused by these provisions. It is a fundamental principle of criminal law that the onus lies upon the state to prove all elements of a crime. These rules cut across that principle: whilst the verification requirement presents grave practical difficulties and is therefore likely to promote self-censorship by the media. It is accordingly submitted - notwithstanding this judgment - that the provisions go further than is 'reasonably justifiable in a democratic society' and that - to the extent (at least[3]) to which they place the onus upon the accused - they are unconstitutional.

### 3.2.2. Obscene and Indecent Publications

As Nwabueze[4] points out, it is 'difficult to give a single

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1 R v Amalgamated Press, supra, at 202.

2 Ibid, emphasis supplied.

3 It may also be contended that the provisions are too vague and wide-reaching to be constitutional; and that closer definition is required of what is meant by a statement 'likely to cause fear and alarm to the public' or 'to disturb the public peace'.

4 B.O. Nwabueze, Constitutional Law of the Nigerian Republic, London, 1964.

definition of what constitutes the offence of obscenity in Nigeria, because the law governing the matter is different in different parts of the country'.[1]

In the northern states, the matter is governed by the United Kingdom Obscene Publications Act, 1857 (which applies, by virtue of the general reception process previously described[2], as a 'statute of general application in force in England on 1 January 1900'); and by s 202 of the Penal Code.

The latter renders it an offence, punishable by two years' imprisonment or fine of unspecified amount or both, to sell, distribute, import, print or make for sale 'any obscene book, pamphlet, /or/ paper'[3] or to have possession of such articles. No definition of obscenity is provided either by the Penal Code or by the United Kingdom statute, which 'simply empowers... magistrates to order 'seizure and condemnation' of obscene publications, leaving its punishment to the common law'[4]. The common law test of obscenity (now reflected in more recent English legislation[5]) is whether the matter in issue has the 'tendency... to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall'.[6]

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1 Nwabueze, ibid, p 370.

2 See p 131 above.

3 Various other articles, including paintings and figures, are brought within the ambit of the section; and the list reflected in the text above is limited to those most relevant to the media.

4 A.A. Adeyemi, 'Obscene and Indecent Publications', in T.O. Elias, ed., Nigerian Press Law, London and Lagos, 1969, pp 109-121, p 112.

5 See the Obscene Publications Act 1959, 7 & 8 Eliz.2c.66, s 1.

6 This test was laid down in R v Hicklin, (1868) L.R. 3 Q.B. 360 at 371, per Cockburn, C.J.

In the eastern states, the governing legislation is again the Obscene Publications Act 1857, but this time in conjunction with s 232 of the Criminal Code.[1] The latter renders it a misdemeanour, punishable by two years' imprisonment or fine of two hundred naira, to make, produce or possess any obscene writings, printed matter, pictures or photographs[2]; to import, convey or export such matter[3]; to carry on any business or dealings in such matters or to distribute or exhibit them[4]; to advertise the fact that such matter is obtainable from any person[5]; or publicly to exhibit any indecent show or performance[6]. The court has wide powers to order the destruction of any obscene matter[7]. The legislation makes no attempt to define what is 'obscene'; and the common law test accordingly applies.

In the western states, the position is substantially the same, except that the Obscene Publications Act 1857 does not apply[8] and the matter is governed entirely by identical provisions of the western Criminal Code.[9]

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1 Cap 30, (Laws of Eastern Nigeria, 1963).

2 s 232(1)(a), ibid. The list of matter included in this provision is considerably more extensive, and only those most relevant to the media have been listed above.

3 s 232(1)(b), ibid.

4 s 232(1)(c), ibid.

5 s 232(1)(d), ibid.

6 s 232(1)(e), ibid.

7 s 232(2), ibid, applicable on the conviction of an accused - and s 232(3), ibid, applicable in other circumstances.

8 This is by virtue of the western states' Law of England (Application) Law, 1959, Cap 60.

9 s 175, Cap 28 (Laws of the Western Region of Nigeria, 1959).

In Lagos State, additional legislation has been introduced, modelled substantially on the United Kingdom Obscene Publications Act 1959. Thus, the Obscene Publications Law 1961[1] applies to the exclusion of the English statute or the Criminal Code,[2] and provides, in brief outline, as follows.

In terms of s 4, it is an offence (punishable by imprisonment for three years or by fine of four hundred naira or both) for a person to distribute or project - whether for gain or not - any article which is deemed to be obscene for the purposes of the Law[3], as further described below. 'Article' is defined as meaning 'anything capable of being or likely to be looked at and read or looked at or read, and includes any film or record of a picture or pictures, and any sound record'[4]. 'Distributes' includes 'circulates, lends, sells, lets on hire or offers for sale or hire'[5] and 'projects' 'in relation to an article to be looked at or heard, includes shows or plays'[6].

In terms of s 3, the test of obscenity is whether the 'effect /of an article/ taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'.[7] '/T/his is substantially

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1 No 51 of 1961. Thus, again, although the law of obscenity is primarily 'colonial' law, the classification is not entirely water-tight.
2 s 7, ibid.
3 s 4(1), Obscene Publications Law, ibid.
4 s 2, ibid.
5 Ibid.
6 Ibid.
7 s 3, ibid.

the Hicklin test, with the difference (a) that the publication must be taken as a whole, and (b) /that/ regard must be had to all relevant circumstances'[1]. Hence, the effect of the statutory definition is to introduce a further 'measure of elasticity into the test of obscenity'[2]. It should be noted that the test is objective and depends upon the article itself; 'and not upon there being an intention on the part of the author or publisher to corrupt'[3]. However, a person is not to be convicted 'if he proves that he had not examined the article in respect of which he is charged and /that/ he had no reasonable cause to suspect that it was such /as to render him liable under the statute/'.[4]

The statute confers wide powers of search and seizure, providing - in essence - that if a magistrate 'is satisfied by information on oath that there is reasonable ground for suspecting that /obscene/ articles... are... /being/ kept for publication for gain in any premises... stall or vehicle..., /he/ may issue a warrant... empowering any constable to enter (if need by force) and search the premises,... stall or vehicle... and to seize and remove any article found /there/ which the constable has reason to believe to be obscene...'[5]. Such articles may be brought before a magistrate, who may order their forfeiture[6].

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1 Adeyemi, op cit, p 113.

2 Ibid. Adeyemi also submits, however, that the provisions of s 3(2) of the statute deprive the phrase 'taken as a whole' of much of its practical efficacy.

3 Halsbury's Laws of England, 4th ed., Vol. 11, para 1017, n 4, citing R v Shaw, [1962] A.C. 220 (H.L.(E.)).

4 s 4(2) Obscene Publications Law, supra.

5 s 5(1), ibid.

6 s 5(3) to 5(8), ibid.

An important defence to liability is provided by s 6, which states that a person may not be convicted (and an order for forfeiture may not be made) 'if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'[1]. In considering the defence, 'the strength of the tendency to deprave and corrupt.../and/ the strength of the literary, sociological or ethical merit'[2] of the publication must be balanced. The opinion of experts as to the literary, artistic, scientific or other merits of an article are admissible in evidence in this regard.[3]

The ambit of the statute is limited in a number of important respects. Thus, it does not apply to 'exhibitions in private houses to which the public are not admitted or to anything done in the course of television and sound broadcasting'[4]. Furthermore, no prosecution for an offence under s 4(1)[5] may be commenced more than two years after the commission of the offence.[6]

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1 s 6(1), ibid.

2 Halsbury's Laws of England, supra, para. 1018, n 3.

3 s 6(2), Obscene Publications Law, supra.

4 s 3(2), ibid. As regards the latter limitation, the broadcast media are instead made subject to the duty not to include in programmes any matter 'which is likely to offend against good taste or decency or... to be offensive to public feeling'. See s 8(a), Federal Radio Corporation of Nigeria Act 1979, discussed at p329 below, and the equivalent provisions in the Nigerian Television Authority Act 1977, discussed at p335 below.

5 The provisions of s 4(1) are, of course, discussed above at p 235.

6 s 4(4), Obscene Publications Law, supra.

In Lagos State, further legislation - the Children and Young Persons (Harmful Publications) Law, 1961[1] - renders it an offence (punishable by six months' imprisonment or fine of two hundred naira or both) to print, publish, sell or hire or to possess for purposes of sale or hire any book or magazine to which the statute applies.[2] Such books and magazines are defined as those 'of a kind likely to fall into the hands of children or young persons and consist/ing/ wholly or mainly of stories told in pictures (with or without the addition of written matter), being stories portraying -

(a) the commission of crimes; or

(b) acts of violence or cruelty; or

(c) incidents of a repulsive or horrible nature;

in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall'[3].

It is, however, a defence for the accused to prove that 'he had not examined the contents of the book or magazine and had no reasonable cause to suspect that the book or magazine was one to which th/e/ law applies'.[4]

Wide powers to search for and to dispose of works to which the statute applies, or of articles which are used in their publication, are conferred by s 5; but no prosecution for an offence under s 4(1)[5] may be commenced without the consent

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1 No 52 of 1961.

2 s 4(1), ibid.

3 s 2(2), ibid.

4 s 4(2), ibid.

5 See text above.

of a Law Officer.[1]

As regards the common law, it should be noted that 'it is an indictable offence at common law to publish obscene matter'[2] as well as to 'procure obscene prints or libels with intent to publish them'[3]. 'These offences are punishable by fine and imprisonment at the discretion of the court'[4]. However, these 'unwritten' rules are no longer applicable in Nigeria, by virtue of s 33(12) of the 1979 Constitution[4a] (and its predecessors).

There is a marked paucity of Nigerian cases reflecting the operation of these laws and it is accordingly difficult to assess the extent to which they constitute a restriction on freedom of the media in practice. As regards their constitutionality, they are prima facie in violation of the right to 'receive and impart ideas and information without interference', as guaranteed by s 36 of the 1979 Constitution. However, s 41 makes express provision for the saving of any law 'reasonably justifiable in a democratic society... in the interest of... public morality'[5]; and the laws examined above appear to fall within the ambit of this provision. Leaving aside the question whether it is the proper province of law to dictate moral standards to adults, the major objection that may be made to the legislation is its uncertainty.

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1 s 4(3) Children and Young Persons (Harmful Publications) Law, supra.

2 Halsbury's Laws of England, supra , para. 1022. Note that the Lagos statute contains no proviso in relation to matters falling within the statutory definition of obscene, as is found in the United Kingdom Obscene Publications Act, s 2(4).

3 Ibid.

4 Ibid.

5 s 41(1)(a), Constitution of the Federal Republic of Nigeria, 1979.

4a. s 33(12), Constitution, infra, (replacing earlier provisions to the same effect) states that 'a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law'

The definition of what is 'obscene' is extremely broad; and the fact that it is also objective exacerbates the position. The legislation applicable in Lagos State goes some way towards meeting certain difficulties by (for example) making the definition more elastic and by introducing the defence of publication 'for the public good'. It is accordingly arguable that the Obscene Publications Law of Lagos State, as well as the Lagos statute prohibiting publication of matter harmful to children and young persons, are indeed constitutional; whilst the law applicable in the remainder of the country (especially the North) is too vague to meet the criterion of being 'reasonably justifiable in a democratic society'. In the absence of cases illustrating the manner in which the rules are applied in practice, however, the matter must remain largely speculative.

## 3.3. Legislation of the First Republic

During the period of the First Republic - which lasted from the attainment of independence in 1960[1] to the military coup of January 1966 - a number of statutes relevant to freedom of the media were introduced. The most important of these are briefly summarised below.

### 3.3.1. Disclosure of Official Secrets

The Official Secrets Act 1962[2] forbids the reproduction or

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1 See the section on the History of Nigeria at p 92, et seq.

2 No 29 of 1962. This repealed and replaced the earlier enactment of 1958 which had extended to Nigeria the United Kingdom Official Secrets Acts of 1911 and 1920. The Act applies throughout the Federation, as expressly provided by s 10(2).

transmission (inter alia) - without lawful authority - of any 'classified matter', defined (in essence) as any information the disclosure of which has been prohibited under any system of security classification in force at the time and would be prejudicial to the security of Nigeria[1]. It is, however, a defence to a charge under this provision if the accused proves that, at the time he reproduced or transmitted the material, he did not - and could not reasonably have been expected to - believe it to be classified and (further) that as soon as he realised this - or should reasonably have done so - he placed his knowledge of the case at the disposal of the police.[2]

The Act also makes it an offence - for a purpose prejudicial to the State - to enter a 'protected place'; to photograph, sketch or otherwise record its physical description; to reproduce any such photograph, sketch or record; or to obstruct or interfere with a person engaged in guarding it. 'Protected place' is defined, in essence, as any military installation or any 'other area' so designated by the Minister.[3] A person charged under this section may be deemed to have acted for a purpose prejudicial to the State - but only if, from the surrounding circumstances (including his character and general conduct), he appears to have acted for such purpose.

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1 Section 1(1), ibid.

2 Section 9, ibid.

3 Section 2, ibid, emphasis supplied.

The Act further prohibits (during a period of emergency[1]) the sketching or photographing of any 'defence material' specified in the Defence Minister's prohibition order, save with the written permission of the latter.[2]

The punishment for all three of the above offences is imprisonment for a term not exceeding fourteen years. No proceedings may be instituted under these provisions without the consent of the Attorney-General or Director of Public Prosecutions of either the Federation or one of the states.[3]

As for the effect of the Act on freedom of expression in Nigeria, this is somewhat difficult to gauge - especially as there are no decided cases on this topic. In the view of Ohonbamu[4], it is a legitimate restriction since it 'is designed not necessarily to prevent comments upon matters of public interest, but only to prevent espionage and the communication or transmission of information vital to the security of the state from falling into the hands of an enemy... /or/ potential enemy with whose country there is a likelihood of war'.[5] Clearly, it is less wide-ranging than United Kingdom Official Secrets legislation - which is briefly analysed below in order to demonstrate the contrast.

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1 See section 70 of the Republican Constitution and its counterpart in the 1979 Constitution and the discussion of the effect of a declaration of an emergency in the section on the general scheme for the protection of human rights at p 188, above.

2 Section 9(1), Official Secrets Act, supra.

3 Section 7, ibid.

4 O. Ohonbamu 'State Security and the Press' in T.O. Elias (ed.) Nigerian Press Law, London and Lagos, 1969, pp 35 - 45.

5 Ibid, p 40.

The most notorious provision in the United Kingdom Act is s 2 of the Official Secrets Act, 1911. This is too long and complex a provision to reproduce in full; but subsection (1)(a) and (2) are set out below, in order to provide some idea of its terms.

2. Wrongful communication, etc., of information

(1) If any person having in his possession or control /any secret official code word, or pass word, or/ any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained /or to which he has had access/ owing to his position as a person who holds or has held office under His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract, -

> (a) communicates the /code word, pass word/ sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or,

(2) If any person receives any /secret official code word, or pass word, or/ sketch, plan, model, article, note, document, or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the /code word, pass word,/ sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of a misdemeanour, unless he proves that the communication to him of the /code word, pass word,/ sketch, plan, model, article, note, document, or information was contrary to his desire.

Subsection (1) thus prohibits the unauthorised communication or passing on of official information - a restriction which may seriously hinder the press in fulfilling their role as "watchdogs" over society in general (and over those in authority especially). Subsection (2) has even more serious consequences for the media, however, for it renders it a crime (subject to the same penalty of two years' imprisonment

as applies to subsection 1) to 'receive' unauthorised information, knowing or having reason to believe its communication to be prohibited by the Act; unless the recipient is able to prove that the communication to him was 'contrary to his desire'.

This wide-ranging prohibition has had serious consequences for freedom of expression in Britain. As discovered by the Franks Committee[1] (established in 1972 to report on the Acts in the face of growing public criticism and concern at their wide ambit), the small number of prosecutions under the section[2] 'disguises the much greater effect that the section has had'[3]. In the words of the Report of the Committee, although 'Section 2 is rarely activated in the courtroom,... it is seen by many as having a pervasive influence on the work and behaviour of hundreds and thousands of people'[4].

Those prosecutions which have been brought clearly reveal the wide-ranging ambit of the section. For example, in the Sunday Telegraph trial in 1971[5] (which was of particular interest to Nigeria) the editor of the Sunday Telegraph

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1 Departmental Committee on Section 2 of the Official Secrets Act 1911, (chaired by Lord Franks), Cmnd 5104, 1972.

2 The Committee discovered 23 between 1947 and 1972.

3 Leslie Chapman and Robin Chapman: 'The Official Secrets Act: Its History and Effect' in Secrecy, or the Right to Know, published by the Library Association for the Freedom of Information Campaign, London, 1980.

4 Para. 26, supra. See also Robin Callender Smith, Press Law, London, 1978, p 178.

5 Cited by Callender Smith, ibid, pp 150-151.

(amongst others) was prosecuted under section 2 for having published a report (compiled by the defence advisor to the British High Commission in Lagos) regarding the Nigerian civil war. This report 'criticised the poor leadership and tremendous waste displayed by Nigerian officers' and revealed that 'the /British/ Prime Minister ... and his Foreign Secretary... had misled the public about the extent of British army support provided to Nigeria'.[1] No military intelligence was contained in the report, nor was any of its information secret.[2]

Although the accused were ultimately acquitted, the fact that proceedings were brought against them in the first instance clearly demonstrates how far the provision goes in inhibiting freedom of expression. Moreover, the outcome of the case was largely the result of the 'stubborn common sense'[3] evinced by Mr. Justice Caulfield in summing up to the jury - and in emphasising that 'there is no duty in law for an editor or his newspaper to go running to Whitehall to get permission to print articles or news'[4]. However, the fact remains that the Act is extremely broadly worded; and that it thus constitutes a major threat to media freedom, in that it 'inhibit/s/

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1 Smith, supra, p 150.

2 Ibid.

3 Callender Smith, ibid, p 151.

4 This dictum is reproduced in Callender Smith, ibid.

the /media/ from doing things which may be quite legitimate'[1].

In the decade since this decision, the Franks Committee has recommended the repeal of the section in favour of a more restrictive prohibition; and various attempts have been made to secure this. So far, however, none has succeeded[2].

A comparison of the United Kingdom legislation with the Nigerian Official Secrets Act shows clearly that the latter is far more limited in ambit. It is accordingly submitted by Ohonbamu that the Nigerian legislation (unlike the United

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1 Callender Smith, ibid.

2 See the Labour Party White Paper, 'Reform of Section 2 of the Official Secrets Act, Cmnd. 7285, 1978; the Freedom of Information Bill introduced by the Liberal Member of Parliament, Clement Freud, which secured considerable support but fell with the Government in April 1979; and the Protection of Official Information Bill, introduced by the new Conservative Government in October 1979, but withdrawn before its second reading the following month.

For a comprehensive review of the United Kingdom laws, see Patricia Hewitt, The Abuse of Power, Oxford, 1982, pp 81 - 90; S.H. Bailey, D.J. Harris and B.L. Jones, Civil Liberties: Cases and Materials, London, 1980, pp 272 - 286; Smith, op cit, pp 145 - 154; and the publication Secrecy, or the Right to Know?, supra.

Kingdom statutes) cannot be '"technically" contravened by the disclosure of information which bears no relation to national security'[1]; and it is clear that he believes that the Act goes no further than is necessary in protecting legitimate interests of the State and in providing essential guidelines as to where the individual (and the journalist, especially) should 'draw the patriotic line'[2]. It is submitted, however, that this may be too sanguine a view, for the definitions of both 'classified matter' and 'protected place'[3] are extremely wide and depend entirely upon the unfettered discretion of the Minister.

The Official Secrets Act cuts prima facie across the constitutional guarantee of freedom of expression enshrined within the Nigerian constitution, for it undoubtedly restricts the freedom to 'impart and receive ideas and information without interference', guaranteed by s 36. However, it is also arguable that the law is 'reasonably justifiable within a democratic society' in the interests of defence, public safety and public order, within the meaning of s 41(1)(a). It is clear that every state must take steps to maintain its security and that the communication of official secrets to an enemy (or potential enemy) may therefore legitimately be curtailed. Insofar, however, as the Nigerian legislation is vague in its provisions or casts the onus upon the accused to establish his innocence,

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1 Ohonbamu, op cit, p 41.

2 Ibid.

3 See text at p 241 above.

it is arguable that it goes beyond what is 'reasonably justifiable in a democratic society' for these purposes and is accordingly unconstitutional. The question is, however, a complex one; and requires more detailed examination than can be accorded to it in this study in order to reach a definitive view.

### 3.3.2. Publication of a False Statement, Report or Rumour

In 1964, a controversial amendment was made to the Newspapers Act, 1958[1]. The controversy centred around section 4 of the amending statute[2], which - in essence - rendered it an offence (punishable by a fine of £200[3] or imprisonment for one year) to publish 'any statement, rumour or report knowing or having reason to believe /it to be/ false'[4]. Whilst this, in itself, may appear unobjectionable, the sting lies in the tail of the provision: which presumes knowledge of falsity by the accused and casts the onus on him to prove that 'prior to publication, he took reasonable measures to verify the accuracy of /the/ statement, rumour or report'[5].

The repercussions of this amendment for freedom of the press are difficult to gauge. In the view of one commentator at least[6], its effect has been slight, although 'it

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1 Cap 129, (Laws of the Federation of Nigeria and Lagos, 1958).

2 The Newspapers Amendment Act, 1964 (no V of 1964), described in detail by T.O. Elias, 'Legal Requirements for Publishing a Newspaper', in T.O. Elias, (ed.), Nigerian Press Law, London and Lagos, 1969, pp 1 - 15, at pp 5-6.
This provision is now contained in s 21, Newspapers Law, Cap 86, (Laws of the Lagos State of Nigeria, 1973).

3 This is the equivalent of ₦400.

4 S. 4 of the 1964 Amendment Act, and s 21, supra.

5 Ibid.

6 John P Mackintosh, Nigerian Government and Politics, London, 1966.

did limit reports of troubles during the 1964 elections in the North as no paper could afford an itinerant investigator to check all facts. /Its/ effect /therefore/ was on reportage, not on editorial criticism, which... remained as spirited as ever'.[1]

This sanguine view contrasts sharply, however, with the misgivings voiced by Nwabueze. In his view, 'the law imposed very serious limitations upon newspaper reportage, since no newspaper in Nigeria could afford to post field reporters in every part of the country to check upon the truth of every report. Besides, the truth of alleged political persecution or electoral malpractices might be difficult to prove. And so it was that the rigging of the 1964 federal elections failed to get adequate newspaper coverage'.[2]

It is interesting to note that an exact equivalent of this provision - introduced in Lagos in the teeth of considerable opposition from the media - was already included in the Newspaper Law of the eastern states[3]. It seems, thus, that 'the highly controversial issue raised by th/is/ statutory provision /in the East/... had been overlooked because it occurred in a Regional enactment'[4]. In the western states, a substantially similar provision was introduced (also in 1964) by the Newspapers (Amendment) Law

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1 Ibid, pp 48-49.

2 B.O. Nwabueze: Constitutionalism in the Emergent States, London, 1973, pp 151-152.

3 Newspaper Law (eastern states) Cap 86 (Laws of Eastern Nigeria, 1963), s. 16.

4 Elias, op cit, p 11.

of 1964[1].

As regards the constitutionality of these provisions, the same arguments as previously adduced[2] in relation to the substantially similar offence of publishing 'false news, likely to cause fear or alarm', apply mutatis mutandis to these laws. In addition, it is submitted by Elias[3] that the fact that 'no criminal prosecution may be commenced /for these offences/ without the prior order of a judge in chambers /or of the Attorney-General, as used to be the case in the western states[4]/ cannot be regarded as satisfactory'[5]. Furthermore, in the view of Nwabueze[6], these provisions are 'in direct conflict with the principle that the constitutional guarantee of freedom of the press requires that knowledge of the falsity of the statement should be proved as a fact by the state, and not presumed'[7].

It is submitted that the provisions in question are accordingly unconstitutional: for they are fundamentally inconsistent with the guarantee of freedom of expression enshrined in section 36.

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1 No 26 of 1964. These provisions were, however, repealed in 1967 by the Newspapers (Amendment) Law (Repeal) Law of 1967, no 29 of 1967. For further information, see Elias, op cit, p 12 et seq.

2 See p 232 above.

3 Supra.

4 See the erstwhile s 27A(2) of the Western Newspapers Law, Cap 81 (as incorporated by the amending legislation of 1964).

5 Elias, supra, p 11

6 B.O. Nwabueze, The Presidential Constitution of Nigeria, London, 1982.

7 Ibid, p 477.

## 3.4. Legislation of the Military Government

During the period of military rule in Nigeria, from 1966 to 1979, a number of laws relevant to the media were promulgated by the military authorities. In this section, it is proposed to canvass in brief the most important of these.

### 3.4.1. Ban on the Circulation of Newspapers.

One of the most effective means of gagging unwelcome press criticism is to ban the circulation of outspoken newspapers. Although a clear contravention of the constitutional guarantee of freedom of expression[1], a ban had in fact been imposed on the Post and Times newspapers by certain local government councils in the aftermath of the controversial General Elections of 1964[2]. It is interesting to note that one of the first actions of the new military regime was to lift these restrictions and to prohibit similar bannings in future. Thus, the Circulation of Newspapers Decree[3] made it an offence, punishable by substantial fine or period of imprisonment, to 'd/o/ anything calculated to prevent or restrict the distribution or general sale of any newspaper in any part of Nigeria.[4]

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1 It may be recalled that the Constitution Drafting Committee stressed that such bans were unconstitutional and indicated that proceedings could have been taken to secure redress, when newspapers were in fact banned during the period of the First Republic. (The Committee thus considered that the guarantee of freedom of expression was adequate (even though it had not been invoked in practice) and this was one of the reasons for the Committee's refusal to introduce an express guarantee of freedom of the press, as previously discussed at p 216 above).

2 Elias, 'The Law, the Press and the Public' in TO Elias, (ed.) Nigerian Press Law, London and Lagos, 1969, pp 122-136, p 133.

3 Decree No. 2 of 1966.

4 s 1(2), ibid.

There was then a fundamental change of heart, for 1967 witnessed the introduction of the Newspapers (Prohibition of Circulation) Decree[1], which authorised the Head of the Military Government to prohibit the circulation or sale of any newspaper in Nigeria 'where /he/ is satisfied that /its/ unrestricted circulation... is or may be detrimental to the interest of the Federation or of any state thereof'.[2]

It is interesting to note the view of one writer at least that this restriction was imposed only '/a/s a result of persistent and what was widely felt to be mischievous reporting on the part of certain foreign newspapers'.[3] The terms of the Decree are clearly wide enough, however, to extend to any newspaper, either local or foreign; and the only newspaper initially banned under its provisions was, in fact, the Biafra Sun[4]. It must, on the other hand, also be remembered that the country had been 'plunged into a bloody civil war'[5] only three days previously and that the operation of the Decree was expressly limited to 12 months - 'unless sooner revoked or extended'[6].

It is difficult[7] to trace any express extention of the Decree

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1 Decree No. 17 of 1967.

2 s 1(1), ibid.

3 See Elias, op cit, p 133.

4 This was in terms of the Biafra Sun (Prohibition of Circulation Order) 1967, effective 30 May 1967.

5 Elias, supra, p 131.

6 s 1(1), Decree No. 17 of 1967.

7 There are no records of further extensions in the official records of legislation, but is is possible that these may have been omitted. The lacuna casts considerable doubt on the continued efficacy of the enactment - though this did not deter the Federal Military Government from subsequently invoking it (as further described in the text below).

after the expiry of this period; and also to ascertain whether any other newspaper was banned under its terms prior to 1978. In June of that year, the Federal Military Government imposed a two-year ban[1] on the circulation of the fortnightly magazine Newbreed (printed in Britain). The Government also seized its mid-June issue, which contained an article querying 'Who is ganging up on Chief Awolowo?', as well as comment on the 'Uses and Abuses' of the National Security Organisation[2]. (An earlier issue, which featured an interview with the former Biafran leader, Colonel Ojukwu, had also been seized in May 1977). Any question as to the lawfulness of these seizures or the ban on circulation was excluded by the Newspaper (Prohibition of Circulation) (Validation) Decree, 1978[3].

At State (as opposed to Federal) level, the Military Governor of the South-Eastern State banned the Nigerian Daily Standard (Calabar) in 1970 for criticising his administration. This ban was lifted after five years by a new Governor, who simultaneously made it clear that 'he would not tolerate irresponsible journalism'[4]. In addition, the Morning Post and Sunday Post newspapers were banned in the western states in 1967[5].

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1 This was in terms of the Prohibition of Circulation ""Newbreed") Order, 1978, (L.N. 46 of 1978).

2 /1978-79/ Africa Contemporary Record, p B739.

3 Decree No. 12 of 1978.

4 /1975-76/ Africa Contemporary Record, p B795.

5 This was in terms of the Morning Post and Sunday Post (Prohibition) Edict, 1967, (W.N. 12 of 1967).

These appear, from the sources available, to be the principal instances of newspapers being banned by the authorities during the thirteen years of military rule. It seems, therefore, that - despite the wide-ranging power conferred by the Decree of 1967 - it was, in fact, seldom invoked.

The enactment was repealed in 1979[1], in preparation for the return to civilian rule (though it is interesting to speculate as to whether this was indeed necessary, given the fact that the Decree was expressed to be operative for twelve months only[2], unless extended - and there appears to be no record of extension having been effected). Be that as it may, the repeal of the legislation is greatly to be welcomed: for the statute could not be considered consistent with the constitutional guarantee of free expression. It was, of course, arguably legitimate as a law 'reasonably justifiable in a democratic society' in the interests of public order and public safety[3]. However, it is submitted that there is little force in such a contention: and that the wide-ranging and unfettered discretion[4] vested in the President under the enactment - which entitled him to ban any newspaper which '/might/ be detrimental to the interests of the Federation' - went further than was 'reasonably justifiable in a democratic

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1 This was in terms of the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals, etc) Act, 1979 (No 105 of 1979).

2 See p 252 above.

3 See s 41(1)(a), Constitution of the Federal Republic of Nigeria, 1979.

4 The unconstitutionality of an absolute and unregulated executive discretion is further discussed at p 378 below.

society'. Any law which undermines the liberties guaranteed by the Bill of Rights should be reasonably certain and strictly limited to what is truly necessary to protect interests such as public order and public safety; and a statute which goes beyond this should not be considered constitutional. It is interesting to note, moreover, that the reason for the repeal of this (and various other decrees of the Military Government) was to facilitate the exercise of fundamental freedoms in the new era of the Second Republic[1]. This accords clear - if implicit - recognition to the incompatibility of the banning power conferred by this legislation with the guarantee of freedom of expression.

### 3.4.2 Restriction of Matter Likely to Cause Public Alarm or Industrial Unrest

Under the Trade Disputes (Emergency Provisions) (Amendment) (No. 2) Act, 1969[2], it is an offence, punishable by five years' imprisonment, 'for any person to publish in a newspaper... any matter which, by reason of dramatization or other defects in the manner of its presentation, is likely to cause public alarm or industrial unrest'[3].

There are no reported cases reflecting the operation of this provision in practice; and it is accordingly difficult to

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1 See the Explanatory Note to Act No 105 of 1979, supra.
2 (Decree) No. 53 of 1969.
3 s 1(e), ibid.

assess the extent to which it has served to restrict press freedom in the past. Its terms are slightly more precise than those of the Newspapers (Prohibition of Circulation) Decree, described above; and it could accordingly be more cogently argued that this restriction is one 'reasonably justifiable in a democratic society' in the interests of public order and public safety. However, it is again submitted that any statute which infringes fundamental liberties guaranteed by the Bill of Rights must be precise and certain in its formulation, and must go no further than objectively required to protect the particular interest in issue. Hence, the provision - by virtue of its inherent ambiguity - should not be accepted as constitutional.

### 3.4.3. Reproduction of Coypright

The governing enactment in the context of copyright is the Copyright Act 1970[1], which applies throughout the Federation.[2] No succinct definition of copyright is provided by the statute (which instead includes a number of detailed rules applicable to different types of copyright material[3]) and the definition of copyright provided by the Oxfcrd English Dictionary accordingly affords a convenient starting point for brief explanation of the law. According to the Dictionary, copyright is 'the exclusive right given by law for a certain term of years to an author, composer, etc... to print, publish and sell copies of his original work'.

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1 (Decree) No. 61 of 1970

2 s 19, ibid.

3 These are futher explained in brief outline below.

This definition accords in considerable measure with that contained in the United Kingdom Copyright Act 1911, which applied in Nigeria by virtue of an Order-in-Council[1], but has now been repealed in Nigeria by the 1970 statute. The latter today constitutes the sole source of copyright within the country.[2]

In terms of s 1, literary, musical, and artistic works as well as cinematograph films, sound recordings and broadcasts are eligible for copyright[3]; and s 2 confers copyright on every work so eligible provided the author is either a citizen of, or domiciled in, Nigeria or (in the case of a body corporate) is incorporated within Nigeria[4]. In circumstances not covered by s 2, s 3 confers copyright on every work, other than a broadcast, which is eligible for copyright and which is first published or made in Nigeria.[5]

Copyright in a literary, musical or artistic work or in a cinematograph film is defined as 'the exclusive right to control... the reproduction in any material form,... the communication to the public, and... the broadcasting [in Nigeria] of the whole or a substantial part of the work

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1 See Order-in-Council No 912 of 1912, dated 24 June 1912, made under s 25 of the 1911 Act.

2 See ss 18 and 16 of the (Nigerian) Copyright Act, supra.

3 In the case of the first three, further conditions for eligibility (for example, 'sufficient effort... to give [the work] an original character') are prescribed by s 1(2), ibid.

4 See s 2, ibid. Reciprocal protection in relation to countries with which Nigeria has treaty relations in the sphere of copyright is provided by s 14, ibid.

5 s 3, ibid.

either in its original form or in any form recognisably derived from the original'[1]. Similarly, copyright in a sound recording is 'the exclusive right to control in Nigeria the direct or indirect reproduction of the whole or a substantial part of the recording either in its original form or in any form recognisably derived from the original'[2]; and copyright in a broadcast likewise entails the exclusive right to control the recording and rebroadcasting or the communication to the public of the whole or a substantial part of the broadcast.[3]

The first ownership of copyright is governed by s 9, which lays down the general principle that copyright 'vest/s/ initially in the author'[4], subject to the proviso that where a work is commissioned or is made in the course of the author's employment, it vests either in the person who commissioned it or in the author's employer.[5]. Copyright in any eligible work which is made under the direction and control of the Federal or a State Government or by a prescribed international body vests in that government or body.[6]

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1 s 5, ibid.

2 s 7, ibid.

3 s 8, ibid. The broadcasting of literary, musical or artistic works incorporated in a cinematograph film is further regulated by s 6, ibid.

4 s 9(1), ibid.

5 s 9(1)(a) and (b), ibid.

6 s 9(2) read with s 4, ibid.

Copyright is infringed 'by any person who, without the licence of the owner of the copyright... does, or causes any other person to do, an act the doing of which is controlled by copyright'[1] or who imports into Nigeria (other than for his private and domestic use) any article entitled to copyright protection.[2] Such infringment is actionable in the High Court by the owner of the copyright, who is entitled to relief by way of damages, injunction, accounts or otherwise[3]. Damages may not, however, be obtained where 'at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates'[4] but the court may, in such circumstances, order an account of profits.[5]. The court has power to award 'additional damages', where (apart from other material considerations) the infringement is flagrant and 'any benefit /is/ shown to have accrued to the defendant by reason of the infringement.'[6]

The rules provided by the statute are detailed and complex, and further analysis of these lies outside the scope of this study. Assessment of their practical significance is made more difficult by the paucity of reported decisions in this sphere. As regards the constitutionality of the Act, it

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1 s 11(1)(a), ibid.
2 s 11(1)(b), ibid.
3 s 12(1), ibid.
4 s 12(2)(b), ibid.
5 Ibid.
6 s 12(3), ibid.

appears prima facie, to fall within the ambit of laws 'reasonably justifiable in a democratic society' for the purpose of regulating 'wireless broadcasting, television or the exhibition of cinematograph films'[1], or for the purpose of 'protecting the rights and freedoms of other persons'[2]. The time period during which copyright subsists has been considerably reduced under the 1970 Act and now lasts twenty years (from the time of making) in the case of sound recordings and broadcasts and twenty-five years (from first publication) in the case of cinematograph films and photographs; whilst - in the case of literary, musical or artistic works other than photographs - copyright expires twenty-five years after the end of the year in which the author dies [3]. These time periods are substantially shorter than those previously applicable in Nigeria (in terms of the United Kingdom Copyright Act 1911 which, in essence, provided for protection for fifty years from the death of the author or date of first publication[4]). Accordingly - in the absence of evidence that the statute operates harshly in practice - it appears 'reasonably justifiable in a democratic society'; and, accordingly, constitutional.

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1 See s 36(3)(a), Constitution of the Federal Republic of Nigeria, 1979.

2 See s 41(1)(b), ibid.

3 See Schedule 1, Copyright Act 1970, supra.

4 See M.O. Adesanya, 'Newspapers and Copyright' in T.O. Elias, ed., Nigerian Press Law, London and Lagos, 1969, pp 58-66. Unfortunately, the discussion of the copyright infringement in this chapter has become largely out-dated through the introduction of the 1970 legislation.

Note that the United Kingdom Copyright Act 1911 has been repealed and replaced by the Copyright Act, 1956 (4 & 5 Eliz. 2 c. 74), which provides for essentially the same time periods.

### 3.4.4. Prohibition of False Allegations of Corruption

The Public Officers (Protection from False Accusation) Act[1] renders it an offence, punishable by two years' imprisonment without the option of a fine, to propagate, by any means, any false allegation of corruption in relation to any public officer. 'Public officer' is defined as including, inter alia, any member of the Nigerian Armed Forces and Police, any person in the Public Service of the Federation or a State, or in the service of a corporation in which either the Federal or any State Government has a controlling interest.

Although there appear to be no reported cases in which this provision has been in issue, it must nevertheless be viewed as a very serious limitation on freedom of the media. It is widely known that corruption is rife in Nigeria: and the media have an important role to play in investigating and exposing such misconduct on the part of public officials. It is, of course, undeniable that a false accusation of corruption may have serious consequences for any person unjustly accused. However, the existing law of defamation provides sufficient protection for a person whose reputation is damaged by such an accusation; and there seems no reason to impose this additional and draconian measure which not only prescribes imprisonment (for two years) as a mandatory punishment but also - it would seem - imposes strict liability on the publisher of the allegation. Prima facie, the statute makes no provision for consideration of the publisher's knowledge of the falsity of the allegation; nor does it

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[1] (Decree) No. 11 of 1976.

indicate that an honest belief in the truth of the accusation constitutes a defence. Furthermore, the ambit of the enactment is extremely wide, by virtue of the broad definition of 'public officer' which (as indicated above) includes even an employee of a state or federal-owned corporation. It is doubtful whether such sweeping protection against false allegations of corruption is truly necessary.

The law is prima facie in violation of the right to 'impart ideas and information without interference' which is guaranteed by s 36 of the Constitution. It may be argued that it is saved by s 41, on the basis that it is a law 'reasonably justifiable in a democratic society' to protect the rights and freedoms of others. However, it is submitted that it goes further than is reasonably justifiable because of the factors described above: its heavy penalty, apparent imposition of strict liability and wide-ranging ambit. Accordingly, it is submitted that the enactment is unconstitutional; and that it should be acknowledged as being void for inconsistency with s 36 - leaving any public official who alleges that he has been falsely accused of corruption to seek redress under the ordinary law of defamation.[1]

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[1] The law of defamation is described in Chapters Six and Seven below. In these chapters, it is submitted that any public official who alleges that he has been defamed should (following the approach of the United States of America) be required to prove 'express malice' on the part of the publisher as a pre-condition to a successful claim. It is recommended that the same principle should be applied in this context.

## 3.4.5. Regulation of Access to Information

Freedom of the media depends also upon unrestricted access to information. Whether this is indeed available in Nigeria is open to question - for in March 1978, the News Agency of Nigeria (for which provision had been made in legislation of 1976[1]) was established. The function of the Agency is to collect news from all sources, local and international, and to supply 'complete, objective and impartial information'[2] to its subscribers against payment of a prescribed fee.

The implications of this for freedom of the media are difficult to gauge. The first point to note, however, is that Third World countries in general have recently become extremely sensitive to the present monopoly over the international flow of news enjoyed by the four major Western agencies[3]; and are anxious to establish national and regional news agencies of their own in order to counteract the pervasive influence of the "Big Four"[4]. If this were indeed one of the underlying motivations for the introduction of the Nigerian News Agency, it does not bode entirely well for freedom of expression. Such reason for establishing the Agency suggests that it may be intended to present to

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1 The News Agency of Nigeria Act 1976, (Decree) No. 19 of 1976.

2 s 2(1)(c), ibid.

3 These are the Associated Press, Reuters, United Press International and Agence France Presse.

4 See p 38 above, where the problem facing Third World countries in this regard is briefly discussed.

the outside world a particularly favourable image of Nigeria and one which may not always entirely correspond with reality. This, in turn, may therefore call for the suppression or, at least, the "down-playing" of information regarding difficulties with which the country is faced.

The second point to note is that the Agency is entirely Government-controlled, proposals for an independent Trust to perform the functions of news collection and distribution having been rejected[1]. If, therefore, the Agency has sole and full control over the flow of information, there must inevitably be a real risk of it suppressing news in the interests of the Government, as the Kenya News Agency was alleged to have done when it withheld information relating to the Stanleyville paratroop landings in March 1965[2].

The key consideration, accordingly, is the extent to which information may be obtained from sources other than the Agency - and this is not entirely clear from the terms of the Act. Thus, section 2(2) provides that the 'Agency shall have the monopoly of collecting news in Nigeria for sale to foreign news agencies'. This may serve no more sinister purpose than to ensure that all revenue from the sale of news to foreign agencies accrues to the national Agency and hence to the state. However, it may also have the effect of restricting

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1 /1972-73/ Africa Contemporary Record, p B698. Furthermore, the provision in the 1976 legislation for a Council of Trustees (including non-Government representatives, such as members of the Nigerian Bar Association and the Nigerian Guild of Editors) was repealed in 1978 (when the Agency was established) by the News Agency of Nigeria (Amendment) Act, (Decree) No 10 of 1978.

2 East African Standard, 6 March, 1965, (cited by L.O. Adegbite, The Concept of the Rule of Law in Africa, unpublished Ph.D. thesis, University of London, December 1965, p 486 n 1).

the information regarding Nigeria which reaches the outside world; and may have the effect of compelling foreign news correspondents to rely on the Agency alone for their reports. On the other hand, it must also be noted that section 16(2) expressly states that:

> 'Arrangements for news collection and distribution made by the Agency shall be without prejudice to the right of Nigerian newspaper... subscribers to make their own independent arrangements for news coverage by their own correspondents'.

The latter provision clearly seems to give newspapers the choice of either relying on the Agency or pursuing their own independent avenues of information. If this is the correct interpretation, the Nigerian News Agency does not exercise full control over access to information and should not be seen as an infringement of freedom of the media. This may be too sanguine a conclusion, however, for it must also be remembered that a number of participants in the Great Debate saw a real need for a constitutional guarantee of free access to information[1] - a need which remains unfulfilled under the terms of section 36.

It remains to consider the constitutionality of these provisions. Again, the matter is not easy to assess: and depends in large measure on the extent to which the Agency - in practice - controls the flow of information and suppresses news which it considers inimical to the image of Nigeria which it wishes to project. If suppression does occur, this *prima facie* violates the guarantee of the right to

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[1] See for example, The Sunday Observer, 23 January, 1977; The Daily Sketch, 13 January, 1977; The Daily Times, 14 June 1977. (The 'Great Debate' in question is, of course, the debate on the Draft Constitution, previously described at p 105 above).

'receive and impart ideas and information without interference' contained in s 36. Is such violation 'reasonably justifiable in a democratic society' in order to promote an interest which is recognised by the Constitution as justifying derogation? The interests thus recognised by the Constitution are many and varied: but none seems entirely apposite in this context. It is stretching language to assert that such restriction of information (assuming, of course, that it does occur) is justifiable in the interests of 'public order' or 'public safety'; and these are the only recognised interests which are even arguably in point. Suppression in general - in order to boost Nigeria's image abroad - is therefore not to be considered constitutional; though suppression of individual items of news may, of course, be justifiable (on their own particular merits) in terms of the recognised interests. Thus, for example, if the News Agency did not disclose details of troop movements aimed at repelling a threatened invasion, this would clearly be legitimate in the interests of public security.

However, it must again be emphasised that the extent of repression of information by the Agency is uncertain. Accordingly, it is by no means suggested that the entire statute should be repealed - as an Agency of this kind may undoubtedly provide a valuable service - but rather that its principal objectionable feature (the fact that its members are all government-appointed) should be removed. Instead, the majority of appointments to the Agency should be made by autonomous professional bodies, such as the

Nigerian Guild of Editors. In this way, the positive aspects of the Agency would be strengthened: and the risk of its being used to suppress important information would be much reduced.

### 3.4.6 Control through the Nigerian Press Council

In the course of the debate on the new Constitution, a number of hard-hitting criticisms were levelled at the Nigerian press for its low standards of journalism[1] - evidenced especially by its sensationalism (which must often have exacerbated ethnic tensions) and by its failure to investigate the truth underlying the official versions of events. 'Half-truths, mistruths, suppression of truth, jaundiced reporting and witch-hunting, mal-education of the public, sycophancy and lack of guts /were described as being/ the characteristics of the Press in Nigeria.'[2]

As a result, a number of calls were made for the establishment of an independent Press Council to govern the work of journalists and to generate 'a more knowledgeable and professionally competent Press'[3]. There is no doubt that a Press Council may indeed fulfill a vital and constructive role in relation to both the profession and society as a whole. Ideally, its functions should be to preserve and

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1 See, for example, The Punch, 1 February, 1977; The Daily Times, 19 January, 1977; The Daily Sketch, 13 January, 1977; The Daily Times, 14 June, 1977; and The Sunday Observer, 23 January 1977.

2 The Daily Times, 19 January , 1977, supra.

3 The Daily Times, 14 June, 1977, supra.

safeguard media freedom by monitoring and mobilising resistance to any change in the law which threatens to curtail this; to set and maintain high standards of responsibility, independence and impartiality in reporting; and to assist both the public and the profession by providing a knowledgeable forum for the hearing of complaints by the public against individual reporters.

The constructive role that may be played by such a council is well illustrated by the Press Council established in Britain in 1953. This has played an important part in maintaining high standards of journalism and in keeping under review the law and practice of censorship, contempt and libel and is now, despite the controversy surrounding its inception, held in 'growing repute' by both the public and the press itself.[1]

The key element in the high standing enjoyed by the British Press Council is, however, its independence from government control. In the absence of such autonomy, there is undoubtedly a risk that a Press Council which is government-controlled will use its powers to promote the interests of that government - and that freedom of the press will suffer commensurately.

It is accordingly disturbing to note that the Press Council

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[1] H.P. Levy, The Press Council: History, Procedure and Cases, London, 1967, cited by Elias, in The Law, the Press and the Public', op cit, p 132.

established in Nigeria (under the Nigerian Press Council Act of 1978[1]) is not an independent body. Although six of its 14 members are appointed on the election or nomination of autonomous institutions such as the Newspapers Proprietors Association of Nigeria, the Nigerian Guild of Editors, the Nigerian Union of Journalists and the Nigerian Bar Association, its remaining eight members - including the Chairman - are all appointed directly by the executive[2].

Because of this element of control, strenuous objections were raised to the introduction of the Council[3], but passed unheeded by the Military Government. Although the new civilian government under President Shagari has promised to review the legislation, no such action has yet been taken. It seems, however, that such protest has not been entirely in vain; as the Council has not yet been brought into full operation, pending amendment of the legislation 'so as to make it acceptable to all concerned'.[4]

Under the terms of the statute, the duties of the Nigerian Press Council include the promotion of high standards of journalism, the monitoring of legal developments likely to imperil Press freedom, the introduction of a Code of Conduct for the profession and the hearing of complaints against journalists by members of the public.[5]

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1 (Decree) No. 31 of 1978.

2 s 3(1) - (3), ibid.

3 See, for example, /1978-79/ and /1979-80/, Africa Contemporary Record, p B 740 and B 594 respectively.

4 Letter to the writer from Chief Olu Oyesanya, Secretary/ Registrar, Nigerian Press Council, 5 April 1982.

5 s 2, Nigerian Press Council Act, supra.

Under the Code of Conduct, the primary duty of journalists is 'the maintenance, in spirit as well as in deed, of the unity and stability of Nigeria'[1]. Breach of the Code is punishable primarily by fine[2] but the statute also provides more serious penalties in that, under section 16, a journalist may be struck off the register for, inter alia, 'persistent false reportage' - and may thus be precluded (unless and until reinstated) from further practice as a registered journalist[3].

The legislation also sets new standards for admission to the profession, requiring, in essence, the satisfactory completion of approved theoretical and practical training.[4] The Council is given the primary power of decision over applications for registration, alleged breaches of the Code of Conduct and complaints by the public against individual journalists. However, there is also a right of appeal (in the former case) to the Minister and (in the latter two instances) to the High Court.[5]

Insofar as the Act serves to promote higher standards of journalism, it is to be welcomed. There is, however, also

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1 s 6(1), ibid.

2 s 9(1)(c)(ii), ibid. The sub-section also provides for the publication of an apology and of the name of any offending journalist.

3 s 12, ibid provides for the registration of journalists and s 17 makes it an offence for an unregistered journalist to hold himself out as entitled to practise the profession.

4 For further details, see sections 14, 18 and 21, ibid.

5 s 15(1); and 9(3) and 16(5), ibid.

a real risk that it will give further impetus to self-censorship by the press. The primary duty to maintain, in spirit and in deed, the unity and stability of Nigeria[1] is very broad; and, so long as the power of enforcement rests in the hands of a Council that is Government-controlled, journalists will remain understandably reluctant to publish material that may be considered inconsistent with this duty. In addition, the provision for the registration of journalists is a matter for considerable concern; and it is noteworthy, in this regard, that the Press Council in the United Kingdom is rigorously opposed to the imposition of such measures, believing them intrinsically inimical to freedom of the media.[2]

As for the constitutionality of the legislation, this is not easy to assess. If the statute operates in practice to promote self-censorship or results in the punishment of a journalist for failing to maintain 'in spirit and in deed, ... the unity and stability of Nigeria[3]', then this, *prima facie*, would violate the right to 'receive and impart ideas and information without interference' guaranteed by s 36. Moreover, none of the permitted derogations seems entirely apposite to this form of control; and it is accordingly difficult to see on what basis the legislation could be said to be 'reasonably justifiable in a democratic society' in the service of a recognised interest. On the other hand, there are a number of positive features in the legislation;

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1 See s 6(1), *ibid*.

2 Interview with the Secretary of the Press Council, Mr R Swingler in London, in April 1982.

3 See again, s 6(1), Nigerian Press Council Act, *supra*.

and it is submitted that the optimum solution to the difficulty would be to amend the law to remove both executive control over the Council and the system of compulsory registration of journalists. Amended in this way, the legislation would promote the responsibility of the press itself to regulate its own affairs and to improve its journalistic standards; and would thus fulfill a valuable function.

## 3.5. Legislation Since the Return to Civilian Rule

Since the return to civilian rule in 1979, very little new legislation has been enacted[1]; and only one statute has relevance to the media. This is the Electoral Act[2], which (inter alia) provides for the restriction and monitoring of media reports of the forthcoming August 1983 elections for a period of three months before and one month thereafter. This system of control is to be effected through the establishment of a national advisory council on Federal Government-owned mass media.[3]

The press campaigned vigorously against the introduction of this provision; and, following the passage of the bill through the federal legislature, petitioned President

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1 Only seven Acts were passed in 1980; and two in 1981, these being the Finance Act and the highly controversial Allocation of Revenue (Federal Account) Act. 1982 legislation includes the Economic Stabilization (Temporary Provisions) Act and the Electoral Act, below. The only legislation prima facie relevant to the Press is that contained in the Electoral Act, as further described below.

2 Unfortunately, copies of the Electoral Act (notwithstanding inquiry at the Nigerian High Commission, the Foreign and Commonwealth Office and the Institute of Advanced Legal Studies) are not yet available.

3 See /1982/ 4 Index on Censorship, Notes. Since almost all newspapers are government-owned, as further explained at p 285 below, this represents a very considerable restriction.

Shagari not to give his assent to it.[1] In August last year, 'the Nigerian Newspaper Proprietors' Association and the Union of Journalists jointly started a court action, seeking a declaration that /the/ provision... /is/ unconstitutional and void'[2]. Unfortunately, however, no report of these proceedings is yet to hand.

It is submitted that there is considerable force in the media's contention that the provision is invalid under the terms of the constitutional guarantee of freedom of expression. Prima facie, it cuts across the right 'to receive and impart ideas and information without interference' enshrined in s 36(1); and it is difficult to see under which of the recognised interests (for the promotion of which derogation is permitted) the provision can be brought. The only recognisable interests even arguably in point are those relating to 'public order' and 'the rights and freedom' of others, as provided by the 1979 Constitution[3]. Is it tenable to contend that these restrictions on press coverage of the elections are 'reasonably justifiable in a democratic society' for the furtherance of these interests?

The question is not altogether easy to answer. On the one hand, it is clear that full press coverage of the competing parties and their different policies plays an important part in informing the electorate of the choices available

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1 The need for the President's assent to legislation derives from s 54(1), Constitution of the Federal Republic of Nigeria, 1979.

2 Index on Censorship, supra.

3 See ss 41(1)(a) and s 41(1)(b), Constitution of the Federal Republic of Nigeria, 1979.

to it; and, in this regard, it is salutary to note the view expressed by Dr. Akinsanya of the University of Lagos - 'that newspapers were indispensable to the parties during the elections of 1979'[1]. On the other hand, it is also disconcerting to note the concern expressed by Dr Akinsanya 'that federal and state-government-owned newspapers engaged in partisan publication during the campaigns'[2]; and it must accordingly be acknowledged that biased newspaper coverage may inhibit the conduct of 'free' and'fair' elections. If the new legislation succeeds in limiting such partisan reporting, it may fulfill an important role in society and serve to smooth the path of democracy. Viewed in such light, the legislation may be regarded with considerable sympathy. However, the derogations from freedom of expression authorised by the constitution should not be overlooked; and, if a particular provision does not fall within their ambit, no amount of sympathy for its underlying social need or motivation should be allowed to outweigh that fact. In addition, any such 'prior restraint' against publication should - as in the United States of America, as further explained below[3] - be regarded as bearing a heavy presumption against constitutionality: so that it should not lightly

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1 Dr A Akinsanya, 'The Nigerian Press and the 1979 General Elections', in O. Oyediran, (ed.), The Nigerian 1979 Elections, London, 1981, pp 111 - 122, p 122.

2 Ibid, p 121. In Dr Akinsanya's view, '/t/he result /was/ that the U.P.N. and N.P.N. were favoured at the expense of the /other three parties/ /and that/ /t/hese three parties were obviously at a disadvantage as there was not one 'national' newspaper that projected their image to the extent enjoyed by the U.P.N. and N.P.N.'.

3 In the U.S.A., freedom of the press is considered a 'preferred freedom'; and any 'prior restraint' on publication is viewed with particular suspicion - an approach which, as further explained in Chapter Four - has considerable merit.

be considered, 'reasonably justifiable in a democratic society'. Moreover, even though unrestricted election reporting may be partisan, it is preferable to have a choice of biases available, than to be restricted to what governmetn determines to be 'suitable for publication'. If the national advisory council were entirely autonomous and independent, the matter would be considerably different (though, even then, the difficulty of bringing the legislation within the ambit of the permitted derogations would remain).

In sum, it is accordingly submitted that the new provision is indeed inconsistent with the constitutional guarantee of freedom of expression, in that it cannot be fitted into the authorised exceptions and goes, in any event, beyond what is 'reasonably justifiable in a democratic society'. Hence, the legislation in question should be regarded as void to the extent of such inconsistency.[1]

## 3.6. "Extra-legal" Controls over the Media

In addition to the laws described in the preceding sections, it should also be noted that there are two major "extra-legal" controls over the operation of the media: restrictions which are not stricto sensu provided by any law but which nevertheless have great significance for freedom of the media. The first concerns the detention or other harassment of

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[1] It will be recalled, as previously noted, that s 1(2) of the 1979 Constitution provides that any law inconsistent with the Constitution is void, pro tanto.

journalists; whilst the second relates to wide-ranging government ownership of the media.

### 3.6.1. Detention and Intimidation of Journalists

The fear of suffering detention without trial is unquestionably one of the strongest deterrents against the publication of frank, outspoken criticism of those in power. The record of detention and intimidation of journalists in Nigeria is difficult to gauge in full (because of the limited sources of information available), but clearly includes the following instances.

In April and May 1971, the editors of three leading papers (including the Government's Morning Post and the New Nigerian) were arrested for short periods - no reason for this being made public[1];

In June 1971, three editors from the Daily Express and Daily Sketch were detained without trial by the police - again with no public explanation[2];

In 1972, the news editor of the Lagos Daily Times was detained for a month after writing an article on the long-delayed selection of a new principal for Ibadan Polytechnic[3];

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1 /1970-71/ Africa Contemporary Record, p B 420.
2 Ibid, p B 652.
3 /1972-73/, Africa Contemporary Record, p B 698.

Also in 1972, Colin Legum, Commonwealth Correspondent of The Observer, and Bridget Bloom, African Correspondent of of the Financial Times, became the latest of a long list of journalists banned for their reporting of the Nigerian-Biafran civil war[1].

In 1973, the acting editor of the Daily Express and two senior members of her editorial staff were arrested and detained for five hours in Lagos for a front-page editorial criticising an increase in Lagos bus fares[2];

In the same year, the editor-in-chief of East Central State's semi-official daily, Renaissance, was detained for several days by Enugu police along with two colleagues because of a series of articles on border disputes involving the three eastern States[3];

Also in 1973, the chief correspondent in Port Harcourt of the Nigerian Observer, Amakiri, was detained, shaved and flogged for publishing a story on schoolteachers' grievances in Rivers State, as further described below[4];

In 1974, the editor of the Ibadan weekly The News was arrested for a short while for publishing a pamphlet accusing the Federal Commissioner for Communications (J.S. Tarka) of corruption[5];

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1 /1974/ 3 Index on Censorship, Notes.
2 /1973-74/ Africa Contemporary Record, p B 736.
3 Ibid.
4 Ibid.
5 /1974-5/ Africa Contemporary Record, p B 743.

On 11 April 1974, a reporter and the news editor of the Daily Times were arrested for unspecified reasons, though the editor was later released. Following their arrest, 'the Nigerian Union of Journalists appealed to General Gowon... to assist in preventing the unwarranted harassment of journalists by the police. The Union also referred to an earlier incident at Lagos Airport, where Air Force personnel horse-whipped and used their gun butts on journalists awaiting the return of the Nigerian team from the Commonwealth Games. Three of the journalists were injured.'[1]

Also in 1974, the acting editor of the Nigerian Tribune was reported to have been arrested 'after publishing an editorial alleging that General Gowon was surrounded by 'flatterers''[2]. At the same time, it was also reported that a correspondent of a German television network had been refused entry into the country (notwithstanding his valid entry visa) for reasons that were unspecified.[3]

In 1975, the acting editor of the Daily Sketch was arrested - allegedly for writing about an attempt to divert milk imported by the National Supply Company[4];

Also in 1975, the news editor of the Daily Sketch was arrested for publishing a letter criticising the air force and commenting on the Tarka affair (above)[5].

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1 /1974/ 3 Index on Censorship, Notes.
2 Ibid.
3 Ibid.
4 /1974-75/, Africa Contemporary Record, p B746.
5 Ibid.

In addition, in 1975, the editor of the weekly newspaper, The News, the editor of the weekly Sunday Renaissance and Agwu Okpanku, a literary correspondent, were arrested, the latter two in Enugu 'following publication of an article critical of the Federal government'[1].

In 1976, two journalists of the Sunday Renaissance, were detained for over a month for criticizing the Government's decision to change the name of the Bight of Biafra to Bight of Bonny[2];

In 1976, 'Reuter's chief correspondent in Lagos and two of his Nigerian assistants... were arrested without explanation in Lagos on 16 February, when the police closed the agency's office there. The correspondents had given the world the first news of the abortive coup in the country three days earlier.'[3] All were released on the following day, and Colin Fox was deported to the neighbouring state of Benin.

In 1977, 'the West African correspondent of The New York Times was arrested in Lagos on 11 March and expelled the following day. No reason was given'[4].

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1 [1975] 2 Index on Censorship, Notes.
2 [1975-76] Africa Contemporary Record, p B 794.
3 [1976] 2 Index on Censorship, Notes.
4 [1977] 4 Index on Censorship, Notes. Although not strictly relevant to freedom of the media, it is also noteworthy that on 18 Feb., 1977, the home of Nigeria's most outspoken dissident, the musician Fela Anikulepo-Kuti, (a cult figure amongst Nigerian youth) who frequently criticised the military government on the stage of his nightclub "The Shrine", was attacked by several hundred soldiers and set on fire. This was the second such attack in ten days and it was followed by a 'five-hour long riot in the slum section of Lagos, as the soldiers clashed with civilian passers-by'. See [1977] 3 Index on Censorship, Notes.

In 1978, as student protest spread throughout the country following the killing of a student and a pregnant woman at Lagos University on 18 April, a journalist (and woman member of staff) were reported to have been beaten up by police at the University of Ife.[1]

Also in 1978, 'Walter Schwarz, a correspondent for the London Guardian, was expelled without explanation on 10 May - only two days after he had been allowed into the country on a 30-day visa. At the airport plain-clothes policemen searched his briefcase and suitcase, confiscating notebooks and papers.'[2]

In 1980, a correspondent of the New York Times, who had been covering the visit of Vice-President Walter Mondale to Nigeria, 'was expelled without explanation on 19 July - but was allowed to return the following day, officials claiming that a mistake had been made'[3]. It transpired that the executive editor of the New York Times 'had sent Mr. Mondale a telegram informing him of the Nigerian action' and asking him to 'register a protest over this unwarranted violation of free press coverage'[4].

In 1981, the editor of the New Nigerian was arrested on 17 June, on orders of the Chief Justice of Plateau State, for contempt of court. He was kept in custody for five days and then released 'with a warning'[5]. It appeared

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1 /1978/ 4 Index on Censorship, Notes.
2 Ibid.
3 /1980/ 6 Index on Censorship, Notes.
4 Ibid.
5 /1981/ 6 Index on Censorship, Notes.

that the editor had been 'summoned to court to apologise for an article in the 28 May issue of the newspaper, but /had been/ unable to attend, at which the Chief Justice had taken offence'[1].

Also in 1981, in early August, 'six senior Nigerian editors were arrested, and the offices of three opposition daily newspapers raided by the police'[2].

On 3 August 1981, following publication of a front-page story in the Nigerian Tribune on 28 July, in which 'President Shagari was alleged to have bribed opposition federal legislators so as to ensure support for his Bills in the National Assembly'[3], the paper's editor and editor-in-chief were arrested and held, whilst 'more than 100 armed police sealed off and searched their offices'[4]. The journalists were released after 36 hours in police custody; and were charged with sedition. Regrettably, no report of the proceedings (set down for hearing from 9 to 13 November) is yet to hand.[5]

Also in August 1981, the editor and editor-in-chief of the Nigerian Standard 'were arrested and detained for more than 48 hours, and their offices raided'[6]. The issue of 24 July

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1 Ibid.

2 /1981/ 6 Index on Censorship, Notes.

3 Ibid.

4 Ibid.

5 Unfortunately, law reporting in Nigeria is still somewhat incomplete, and there is also some delay in reports being received in London.

6 /1981/ 6 Index on Censorship, Notes.

had featured a front-page story, quoting charges 'by the Gongola State chairman of the Great Nigeria Peoples' Party.. that the President's National Peoples' Party... was plotting to assassinate its political opponents in the state'[1].

Furthermore, on 14 August 1981, the editor of the Daily Sketch was arrested and some 100 anti-riot police raided the offices of the newspaper. On 24 July, the paper had published 'a communique from an opposition party, the People's Redemption Party... which stated /inter alia/... that senior officials of the party were /threatened with/ assassination'[2].

Finally, on 17 August of that year, the Nigerian Tribune editor was again arrested, together with the acting editor of the Sunday Tribune. No reason for this was given by the police[3]; but it may possibly have been in response to an article published some 10 days previously, alleging 'police involvement in a smuggling affair in Nigerian territorial waters'.[4]

In December 1981, the managing editor of the Sketch newspaper and representatives of its publishing company in Ibadan 'were summoned to appear before a Kaduna Chief Magistrate's court over a charge of publishing a false

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1 Ibid.
2 Ibid.
3 Ibid.
4 /1982/ 1 Index on Censorship, Notes.

statement'[1]

In October 1982, '/t/he editor of the Sunday Concord... was arrested and detained for seven hours... on allegations that he possessed the report of the Belgove Tribunal probing the cause of a fire that /had/ gutted the Republic Building in Lagos on 14 December 1981'[2].

Although the record outlined above is not a particularly salutary one, it is encouraging to note that the punishment meted out to Amakiri (as described above)[3] did not go unredressed. The incident provoked a storm of criticism from the press and a joint petition was addressed to General Gowon by the Newspaper Proprietors' Association, the Nigerian Guild of Editors and the Nigerian Union of Journalists[4]. The official who had ordered his punishment was sent on compulsory leave;[5] and, in proceedings brought against him

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1 Ibid. Also in December 1981, Fela Anikulepo-Kuti, singer and musician - and outspoken critic of government - was arrested in Lagos and charged (on seven counts) the following day. He was released on bail some 8 days later, and at trial, was discharged and acquitted when the prosecutor withdrew the charges.

2 /1983/ 1 Index on Censorship.

3 Graphic detail of the indignities suffered by Amakiri is provided by F.O. Shyllon and O. Obasanjo, The Demise of the Rule of Law in Nigeria under the Military: Two Points of View, Ibadan, 1980, pp 14-15. Amakiri's hair was shaved 'in the rain with an old rusty razor blade', he was given 24 strokes 'administered with ruthless military precision leaving /his/ body a mess of blood and bruises, and he was then 'dumped in a disused toilet and locked in there'. (Emphasis as supplied by Shyllon).

4 /1973-74/ Africa Contemporary Record, p B 736.

5 It seems, however, that no penalty was suffered by the Governor of the State who must, presumably, have given the 'superior' order for the journalist's maltreatment.

by Amakiri, was ordered to pay the aggrieved journalist ₦10,000 in damages. Whether this had any substantial effect, however, in curtailing the detention and harassment of journalists by the authorities seems open to doubt. According to one commentator[1], 'the Armed Forces and the Police Forces, as was their wont, ignored /the judgment and/ the arrest of journalists and critics of the government actually intensified'.

The problem of detention of journalists was referred to by a number of participants in the Great Debate on the Draft Constitution, organised by Nigeria's leading newspaper, the Daily Times[2]. Although their remarks are general in nature, they do contribute to general understanding of the extent of intimidation through detention, and the most representative are accordingly reproduced in full:

(a) '/J/ournalists ha/ve/ been detained indiscriminately without trial. Journalists ha/ve/ also been hounded out of their homes by men in authority... For the past ten years, journalists in this country have suffered unlimited outrage (sic) on their individual liberty'[3];

(b) '/M/any journalists as well as contributors for the Press suffered spells of detention for daring to criticise the government before July 29, 1975'[4].

(c) '/H/istory has shown that our response to any form of criticism from either the working journalist or the common man has been immediately to put the critic behind bars, regardless of the authenticity of his or her facts'5.

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1 Onagoruwa, 'Press Freedom in Crisis: A Study of the Amakiri Case,' p 38 (cited by Shyllon, supra, p 15).

2 See the section of the History of Nigeria at p 105 above, as well as the section on the Guarantee of Freedom of Expression at p 204 above. The views of journalists have been published in book form in Ofonagoro W.I., Ojo A. & Jinadu A., (eds.,) The Great Debate: Nigerian Viewpoints on the Draft Constitution 1976/1977, Lagos, 1977.

3 Daily Times, 4 January, 1977.

4 Ibid, 30 December, 1976.

5 Daily Sketch, 13 January, 1977.

(d) 'In Nigeria, the Press has suffered hardships and deprivation in the hands of civilian governments no less than in the hands of the military regime. Among these hardships are unjustified imprisonment and detention of journalists..., arbitrary arrest and torture..., summary dismissals of editors and other journalists who refuse or neglect to kotow (sic) the line of government officials, threat of detention and torture meted out to journalists who dared insist on their right to protect their sources of information..., arson, looting and murder committed against... the press....These journalistic hazards are so great in Nigeria that there is hardly any country in the world to which the expression 'publish and be damned' can be applied more appropriately than in Nigeria'.[1]

Though the Great Debate evoked a number of such comments on detention, this topic nevertheless received considerably less attention than many others - thus suggesting that detention is perceived as a less serious obstacle to press freedom than a number of other factors. Of these, control through government ownership ranks as the most fundamental.

### 3.6.2. Control of the Media Through Government-Ownership

Wide-ranging government ownership of the media generates a profound doubt as to whether freedom of the press - quite apart from the laws previously considered and further described below - can have any real significance in the country. The position was greatly exacerbated in August 1976, when the Federal Military Government assumed control of the three newspapers with the largest circulation and highest reputations in the country: the Daily Times and Sunday Times[2]

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1 Nigerian Herald, 30 November 1976. This inversion of the usual meaning of this phrase seems particularly apt in the context.

2 The circulation figures of these were then 230,000 and 400,000 respectively: /1975-76/ Africa Contemporary Record, p B 794.

and the New Nigerian[1]. The result was to bring virtually every newspaper in Nigeria under either substantial[2] or total government ownership. Only four independent newspapers were left[3], all with small circulations[4] and so financially weak as to be 'overwhelmed by the government-financed newspapers which have the public money at their disposal to employ the best in both material and human resources'[5]. The situation has improved since then with the establishment of the National Concord in 1980 which, though originally a dedicated supporter of the ruling party, has recently adopted a diametrically opposite approach[6]. In addition, early 1983 witnessed the establishment of another independent newspaper, the Guardian, which has attracted into its employ many of the stars of Nigerian journalism[7] and hopes to become a powerful force in the country in time. Nevertheless the fact remains that, at present, the great majority of Nigeria's major newspapers are government-owned and this, coupled with present exclusive government ownership of radio and television broadcasting services, gives the government the indisputable capacity to control the press at its very foundations.

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1 This newspaper was formerly controlled and run by six Northern states (Africa Contemporary Record, ibid); and is 'regarded as the voice of the northern establishment /but also as/ one of the most serious and intellectually independent of the papers': The Times (of London), Special Supplement on Nigeria, 3 February 1982.

2 The Daily Times is 60 per cent government-owned: The Times, ibid

3 Africa Contemporary Record, supra.

4 Ibid.

5 New Nigerian, 18 November 1976.

6 The newspaper is published by 'the wealthy Chief M.K.O. Abiola': The Times, supra. Its change in policy apparently follows a dispute between its publisher and the ruling party: Interview with former Editor-in-Chief of the Daily Times, Chief Alhaji Alade Odunewu, in London, on 23 December 1982.

7 Interview in London with former Editor-in-Chief of the Daily Times, Chief Alhaji Alade Odunewu, ibid.

Although the government has disclaimed any influence over newspaper reporting, particularly in relation to the Daily Times[1], it is difficult to believe that "he who pays the piper does not call the tune" - a truism emphasised by a great many participants in the Great Debate[2] on freedom of the press. It must also be remembered that the corollary of ownership is the power to control appointments and promotions - and the charge has accordingly been laid that 'journalists aspiring to a future in their profession /have been/ forced to prostitute their pens and publish in support of every whim and idiosyncrasy of /government/[3]. Whilst this may perhaps be somewhat exaggerated, it is unquestionably true that, since the government-take-over of the Daily Times, 'the board has been completely reconstituted, the editor changed and a large number of senior men redeployed, many leaving the company as a result'[4]. It has also been alleged that these changes were designed 'to make the paper a more consistent supporter of the ruling National Party of Nigeria, though this is vigorously denied by the party and the new Daily Times men'[5].

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1 See, for example, the emphatic denial (at the time of Military Government) that the Daily Times was 'controlled from Dodan Barracks', reported in /1977-78/ Africa Contemporary Record, p B 746. More recently, the ruling National Party of Nigeria has issued similar denials, as further described below.

2 See the section on the Guarantee of Freedom of Expression at p 204 above; and the publication in which the viewpoints of the press are summarised: W.I. Ofonagoro, A Ojo and A. Jinadu (eds.,), The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/77, Lagos, 1977.

3 New Nigerian, 18 November, 1976.

4 The Times (of London), 3 February 1982.

5 Ibid.

During the period of the First Republic, the consequences of government-ownership of the media for freedom of expression have been described in the following stark terms:

> 'Only such news as was in accordance with the wishes of the ruling parties was... published. There was no question of any newspaper... taking a line that was independent of, not to say adverse to, the government or party that owned it. The function of the press was first and foremost to advertise the owning government or party, and to boost its public image and popularity. Criticism was a secondary role, /expressed only/ when considered desirable or expedient by the political bosses.[1]'

At the time of the debate preceding the adoption of the 1979 Constitution[2], the dangers of government ownership for freedom of the press (especially in a constitutional framework providing for a strong executive presidency) were repeatedly emphasised. Two leading representatives of the press who submitted a memorandum on press freedom to the Constituent Assembly[3] asked for 'a constitutional ban on Government takeovers of privately-owned newspapers... and for an independent trust to manage the dozen newspapers already under the /Government's/ control'[4]. These proposals were rejected, however, in favour of the present constitutional guarantee of freedom of expression which provides no special protection for the media. The result is that government ownership remains in full operation as a pervasive

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1 B.O. Nwabueze, Constitutionalism in the Emergent States, London, 1973, p 152.

2 See the section on the History of Nigeria, at p105 above.

3 The role played by the Constituent Assembly has previously been discussed in the section on Nigerian History, at p 105 above.

4 West Africa, 13 June 1977.

and insidious restraint on media freedom - the effect of which is graphically demonstrated by the following examples.

In June 1982, the Federal Court of Appeal in Kaduna - in a judgment which represented a signal vindication of the claim to Nigerian citizenship of the Majority Leader in the Borno State House of Assembly, Alhaji Shugaba Darman - upheld by a majority the ruling of the Maiduguri High Court declaring that he was indeed a bona-fide citizen of Nigeria, and dismissed the appeal of the Federal Government against this judgment of the lower court[1]. The Daily Times, however, in reporting this decision, stated (in its issue of 17 June) in banner headlines on the front page: 'Shugaba loses suit'[2]. It then 'went on to give a one-sided and totally inaccurate version of the court's proceedings and rulings and ignored the main substance of the Federal Appeal Court judgment - the fact that Alhaji Shugaba was declared a Nigerian, that the Maiduguri High Court was ruled as having jurisdiction by four judges to one and that Shugaba was awarded 50,000 naira as damages and 7,000 naira as costs'.[3] Although the newspaper subsequently published a front-page apology, 'the damage had /already/ been done'[4]. This gross distortion of information embarrassing to the ruling party graphically reveals the dangers of government-ownership; and clearly appears to give the lie to assertions that the

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1 For a full report of these proceedings, see Shugaba v Federal Minister of Internal Affairs and Others, (1981), 2 N.C.L.R. 459.

2 Address by the Kano State Governor at the 5th Graduation Ceremony of advanced writing students of the Nigerian Institute of Journalism, Jos, on 9 July, 1982, reported in the Sunday Triumph, 25 July, 1982.

3 Ibid.

4 Ibid.

60 per cent government holding has affected neither content nor editorial policy.

In the context of the broadcast media, it is equally disturbing to note the coverage devoted by the Nigerian Television Authority ('NTA') to the ruling National Party of Nigeria ('NPN') - to the virtual exclusion of information relating to the other political parties,[1] which 'sometimes /find it/ a running battle to get the television stations controlled by the Federal Government to carry such items at all'[2]. Moreover, the charge has also been made that '/NPN/ functionaries / are allowed by the NTA to/ address the nation and vilify political opponents as if the medium was /the/ property[3] of the NPN, /whilst/ elected government functionaries of other political parties are denied access /to say nothing of/ fair hearing'[4].

Space does not permit the citation of further illustrations of the distortion produced by government-ownership of the media. It is submitted that such ownership strikes at the very heart of press freedom, and that the guarantee enshrined in s 36 of the right 'to receive and impart ideas and information without interference' can have little meaning

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1 See ibid, for a description of the large-scale coverage of, for example, the NPN Special Convention in Lagos, which 'monopolise/d/ the sole network for hours on end at prime viewing time'.

2 Ibid.

3 This, no doubt unintentionally, is somewhat ironic given the fact that the NTA is indeed effectively the property of the NPN-controlled executive, as further explained below.

4 See supra.

so long as the executive retains its present wide-ranging ownership and control of all branches of the media. It is accordingly submitted that the time has come to implement the proposal (made by press representatives during the constitutional debate) for the creation of an independent and autonomous trust to assume control over government-owned media; for only then will the Nigerian press be able to claim in full measure the accolade of being the "freest" in Africa.

## 3.7. The Nigerian Press: The "Freest" in Africa

Portrayal of freedom of the press in Nigeria cannot be complete without according due acknowledgement to the great number of instances when the press has indeed given expression to frank and outspoken criticism. Analysis confined to a ten year period (from 1970 to 1980) reveals numerous illustrations of this - of which the following are merely a random sample.[1]

1970 - the press criticised the implications of the notorious Decree No 28[2] and the New Nigerian's legal correspondent queried whether the Federal Military Government could still be considered as less than a 'total dictatorship'.[3]

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1 For considerable further detail, see Frank Barton, The Press of Africa, London, 1979, especially Chapter Four.

2 The Decree in question is the Federal Military Government (Supremacy and Enforcement of Powers) Decree, promulgated with retrospective effect in the wake of the Lakanmi case as previously described in the section on the History of Nigeria, at p 101 above.

3 /1970-71/ Africa Contemporary Record, p B 418.

1971 - The press were 'pretty severe on corruption at all levels' and proved generally 'capable of publishing critical views or unpalatable facts' - often by means of devices such as 'expressive verbal ellipses' and 'uncaptioned photographs'.[1]

1973 - The press continued its vigorous campaign against corruption at all levels and the New Nigerian called for the public execution for corruption of military officers and other 'big-wigs'. The press expressed much concern over the alleged 'resignation' of the former Commissioner for Health and Social Welfare (S.G. Ikoku) and did not hesitate to publish the letter substantiating his claim of 'dismissal' nor his hard-hitting criticism of the Federal Military Government. Furthermore, sections of the press were highly critical of police methods and hinted that these extended to torture of prisoners awaiting trial.[2]

1974 - The New Nigerian commended the Inspector-General of Police for criticising the arbitrary use of police power and called on the Federal Military Government to reconsider the continuing need for emergency powers. The paper also criticised a senior Army officer for ordering the detention of an individual and described the former as 'a bully trampling on the liberties of a humble, defenceless citizen'. The Nigerian Observer published the article which sparked

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1 /1971-72/ Africa Contemporary Record, pp C 222 and B 652.

2 /1972-73/ Africa Contemporary Record, pp B 695, B 689 and B 696.

off the 'Amakiri' incident - which in turn, evoked a storm of protest from the press throughout Nigeria.[1]

1975 - The press campaigned vigorously for a full investigation into allegations of corruption on the part of the Federal Commissioner for Communications (J.S. Tarka) and this led ultimately to his resignation. The press also gave wide coverage to other corruption scandals, including allegations of large-scale corruption involving the Military Governor of Benue Plateau State (J. Gomwalk).[2]

1976 - The press continued its vigorous criticism of official ineptitude and corruption and, in response to allegations by the Military Chief of Staff that it was corrupt and biased in its reporting, immediately challenged him to substantiate these charges.[3]

1977 - A vigorous debate was maintained throughout 1977 on the need for a specific guarantee of press freedom in the new Constitution and severe criticism was levelled at Government control over newspapers and harassment of journalists.[4]

1978 - The press criticised the authorities' handling of student disturbances and gave considerable critical coverage

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1 /1973-74/ Africa Contemporary Record, pp B 730 and B 736.
2 /1974-75/ Africa Contemporary Record, pp B 742 and B 743.
3 /1975-76/ Africa Contemporary Record, p B 794.
4 /1976-77/ Africa Contemporary Record, p B 745.

to the controversy over the proposal (ultimately rejected) for a new Federal Sharia (Islamic) Court of Appeal; the chairman of the Daily Times urged the Government to relinquish its control over the media; and the editor-in-chief of the magazine Newbreed (and president of the Nigerian Guild of Editors) criticised police raids on the offices of the Punch and Daily Express in Lagos.[1]

1979 - The press protested strongly against the establishment (at the end of 1978) of the government-controlled Nigerian Press Council. The New Nigerian criticised the Federal Military Government for failing to devote as much attention to reducing military expenditure as it had to cutting down numbers.[2]

1980 - The press continued to protest against the Press Council Decree and gave free rein to its views on the controversial Supreme Court decision to uphold the election of President Shagari. The Daily Times criticised senators and members of Parliament for abusing their positions to their personal advantage.[3]

From this brief survey alone, it would seem, therefore, that freedom of the press is by no means a dead-letter in Nigeria. It must, of course, also be acknowledged that the examples above have been arbitrarily selected from the available

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1 /1977-78/ Africa Contemporary Record, p B 739.
2 /1978-79/ Africa Contemporary Record, pp B 740 and B 736.
3 /1979-80/ Africa Contemporary Record, pp B 594-595.

material. They may therefore be the exceptions which prove the rule and over-emphasis on them may provide a totally distorted image of press freedom in Nigeria. It seems, however, from the views of commentators generally[1], that this is not the case. On the contrary, the Nigerian press is largely regarded as enjoying a considerable measure of freedom[2] and there is widespread pride in maintaining its reputation as the freest in Africa. Indeed, in the view of some, the press in Nigeria is 'too' free and is in need, primarily, of greater control and restraint.[3]

The overall picture of the Nigerian press which emerges, therefore, is one of a press subject to a number of restrictive laws (which must inevitable foster self-censorship); and subject also to considerable harassment and intimidation as well as control through government-ownership. Nevertheless, it is a press which remains vocal in its criticism (particularly in areas such as corruption) and which has continued this tradition even through a 13-year period of Military Rule.

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1 See, for example, /1971-72/ Africa Contemporary Record, p B 652; and The Times (of London), 3 February 1982. See also Barton, op cit, p 44, and /1974-75/ Africa Contemporary Record, p B 746, where the Nigerian press is described as having 'continued to maintain signs of its characteristic freedom despite overt and covert institutional pressures.'

2 It may however, be justified to say that 'Nigerian journalism, though free, is not independent: that is, that most newspapers follow a party line and that most journalists do as they are told rather than exercise their own judgment'. See The Times (of London) supra.

3 See, for example, A. Fadlalla, 'Fundamental Human Rights and the Nigerian Draft Constitution', (1977) 10 V.R.U., pp 543 - 553. See also The Daily Times, 4 February, 1977.

Having thus traced - in broad outline - some of the most important restrictions on the media in Nigeria, attention must now be directed towards the principal subject of this study: the laws governing the media which are of 'colonial' origin, as previously identified at the beginning of this chapter. First within this category are the rules providing for licensing and regulation of the media: and this important topic now requires in-depth examination.

# CHAPTER FOUR

# LICENSING AND REGULATION OF THE MEDIA

## 4.1 The Significance of Licensing and Regulation for Media Freedom

The significance of licensing and regulation of the media for freedom of expression lies in the fact that both result in the exercise of "prior restraint" over the content of material reaching the general public by way of the media. Thus licensing of newspapers or broadcasting stations results in only the statements and opinions of the "chosen few" being made available to society; while regulation of the broadcast media (usually, as in Nigeria, by way of vesting control over them in a para-statal corporation) must inevitably affect the selection of programme material and hence, again, must restrict the range of information made accessible to the public.[1]

The absence of such "prior restraint" at the instance of

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[1] It must, of course, be acknowledged that many other constraints inevitably affect and limit the range of material made available through the media. The political standpoint of an editor, the type of audience aimed at, the costs of production, plus a myriad of other factors, all exercise restrictive influence. There is little that law can do to eliminate these. The best that law can achieve, therefore, is to refrain from imposing additional restraints and to establish a climate in which the general public has, at least, 'a choice of biases available to /it/'. See Denys C. Holland, 'Freedom of the Press in the Commonwealth,' (1956) 9, Current Legal Problems, pp 184-207, at p 186.

the executive is seen by many as the hallmark of freedom of expression. Thus, Blackstone, for example, has declared:

'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser... is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and Government.'[1]

Similar sentiments have been expressed by leading judges in England. Thus, Lord Mansfield has observed that:

'The liberty of the press consists in printing without any previous licence, subject to the consequences of the law.'[2]

Lord Ellenborough has avowed that

'The law of England is a law of liberty' and that 'consistently with this liberty... there is no... preliminary licence necessary; but if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal.'[3]

In the viewpoint of Dicey, these principles are essential aspects of the fundamental rule that 'no man is punishable except for a distinct breach of the law.'[4] As Dicey points out, 'this principle is radically inconsistent with any scheme of licence or censorship by which a man is hindered from writing or printing anything which he thinks fit'.[5] He acknowledges that deposit requirements[6]

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1 Blackstone's Commentaries, vol. 4, 151-2.

2 The King v Dean of St. Asaph (1784) 3 T.R. 429 (note).

3 The King v Cobbett (1804) 29 St. Tr. 1.

4 A.V. Dicey, The Law of the Constitution, 10th ed., London, 1959, p 248.

5 Ibid.

6 Deposit requirements in relation to the press do indeed form part of Nigerian law, as further explained below.

and other limitations on the right to publish are not 'of necessity inexpedient or unjust'[1], but nevertheless insists that 'such checks and preventive measures are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence'[2].

Dicey's philosophical objection to the imposition of licensing or other prior control has considerable force. Equally important is the undoubted reality that such restrictions inevitably curtail the free flow of information; and that the temptation for government to use such powers to prevent the dissemination of criticism must always be present. In this regard, it is salutary to recall the warning of Harold Laski that:

> 'An executive that has a free hand will commit all the natural follies of dictatorship... . It will deprive the people of information upon which it can be judged. It will misrepresent the situation it confronts by the art of propaganda... . It will be obtuse to suggestion. It will regard enquiry as menace. It will be careless of truth'[3].

The media have a vital part to play in acting as a check on such governmental abuse of power. In order to fulfill this role, however, they must not be subject to "prior restraint" at the instance of government itself.

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1 Dicey, supra.

2 Ibid, pp 248-249.

3 H. Laski, A Grammar of Politics, 4th ed., London, 1955, p 126.

## 4.2 Licensing and Regulation of the Media in the United Kingdom

Past and present provisions regarding the licensing and regulation of the media in the United Kingdom provide a useful comparative background to the Nigerian law within these spheres.

In regard to licensing of the press, it is noteworthy that, since 1695, no licensing system has been in force. An 'ingenious system of control'[1] had been established in the sixteenth century when 'the Crown assumed the prerogative power to grant printing privileges and thereafter treated this power as its monopoly'[2]. In order to avert the threat 'to the established order of Church and State presented by unrestrained printing'[3], the Stationers' Company was established in 1556 under a royal charter which 'confined printing to members of the Company and its licensees /and/ in return /for which/ the Company undertook to search out and suppress all undesirable and illegal books'[4]. The system continued in force through the Tudor and Stuart eras; and its operation is illustrated by the Licensing Act of 1662, under which 'all printed works had to be registered with, and licensed by, the Stationers' Company,... /and/ a licence was required to import and sell /such works; whilst/ printing presses... had to be registered /and/ wide powers to search for and seize suspected printed matter... were given'[5].

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1 Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 18.

2 Harry Street, Freedom, the Individual and the Law, 5th ed., Harmondsworth, Middlesex, 1982, p 105.

3 Ibid.

4 Ibid.

5 Ibid.

By the end of the seventeenth century, however, 'the demands of business-oriented printers for release from /the/ strictures /of the system/, and the impossibility of managing the surveillance as the number of printers and the reading needs of the public grew'[1] spelt the death of the controls, and licensing of the press accordingly terminated in 1695 when the House of Commons refused to renew the law providing for it.[2]

Provisions for the registration of newspapers were, however, introduced in 1881 in the Newspaper Libel and Registration Act, 1881. S. 1 of the Act defines 'newspaper' as meaning 'any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers.'[3] S. 8 provides that '/a/ register of the proprietors of newspapers as defined by the Act shall be established under the superintendence of the registrar'; and - under s. 9 - it is 'the duty of the printers and

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1 Nelson & Teeter, op cit, p 18.

2 It is accordingly interesting to note that 'the end came not through any decision of principle, but merely through complaints at abuses in operation and the difficulty of devising a workable machinery of control.' Street, op cit, p 105.

3 Note that the definition also includes 'any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements'.

publishers for the time being of every newspaper to make or cause to be made to the Registry Office... /an annual return stating/ (a) the title of a newspaper; (b) the names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence'[1]. These provisions clearly serve a useful purpose, inter alia, in facilitating the ascertainment of those responsible for the publication of a newspaper for the purpose of instituting proceedings: and are a far cry from a system of licensing the chosen few.

As regards the broadcast media, however, the position is considerably different. The British Broadcasting Corporation ('B.B.C.') is a body incorporated by royal charter. Its nine governors are appointed by the Crown on the advice of the Prime Minister and its powers and obligations with respect to broadcasting are contained in a Licence and Agreement.[2] The requisite licence to broadcast is granted by the Home Secretary who is empowered 'from time to time by notice in writing /to/ require the Corporation to refrain at any specified time or at all times from broadcasting any /specified/ matter'[3]; and who is further entitled (without Parliamentary approval) to cancel the licence (or indeed to revoke the royal charter) if the

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1 Ss. 8 and 9, Newspaper Libel and Registration Act 1881.

2 Cmnd 4095, 1969.

3 This is in terms of Clause 13(4) of the Licence, iBid.

Corporation fails to comply with his directions. As Street points out, these 'clearly... are water-tight legal controls'[1].

Pursuant to his power of direction, the Minister 'has sent prescribing memoranda to the B.B.C. that direct it not to broadcast its own opinion on current affairs or on matters of public policy, and not to broadcast matters of political, industrial, or religious controversy'[2]. The B.B.C. also 'accepts that it owes a duty to the Minister to ensure that so far as possible programmes should not offend against good taste or decency, or be likely to encourage crime or disorder, or be offensive to public feeling. It accepts a similar obligation to treat controversial subjects with due impartiality'[3]. The latter duties are not, however, binding upon the Corporation; and non-compliance would not justify cancellation of the licence.

The Independent Broadcasting Authority ('I.B.A.') 'operates under the Independent Broadcasting Authority Act, 1973, as amended by the Broadcasting Act 1980, to provide television and sound broadcasting services additional to those of the B.B.C.'[4] Its top management is appointed by the Home Secretary and it is also obliged to obtain a licence to broadcast from the Minister who is similarly empowered 'at any time /to/ require the I.B.A. to refrain from

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1 Street, op cit, p. 84.
2 Ibid.
3 Ibid, pp. 84-85.
4 Ibid, p. 85.

broadcasting /specified/ matter'[1]. However, the situation is different from that relating to the B.B.C. in that the licence to the I.B.A. 'is silent on programme content and therefore makes no express provision for revocation on non-compliance with directives'[2]. In terms of the Act, however, it is the duty of the I.B.A. to comply with such directives and the Home Secretary could accordingly obtain an order of mandamus requiring this.

The Act imposes various other duties on the I.B.A. Thus, for example, s.2 obliges the I.B.A. to ensure that programmes 'maintain a high general standard in all respects ... and... a proper balance and wide range in their subject matter'[3]. S. 4(1)(a) requires the I.B.A. to satisfy itself so far as possible, that 'nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder, or to be offensive to public feeling'[4]. S. 4 (1)(f) imposes the duty of satisfying itself that 'due impartiality is preserved... with respect to matters of political or industrial controversy or relating to current public policy'[5].

Both the B.B.C. and I.B.A. are required to broadcast any

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1 Street, op cit, p 89.
2 Ibid.
3 Ibid, p 86.
4 Ibid.
5 Ibid, p 87.

Government announcement at the time specified by a Minister[1]; and the 'biggest safeguard against political abuse of this Government power is that the B.B.C. and I.B.A. are entitled to say that the broadcast is being made at the request of the government'[2].

Further detailed rules surround ministerial broadcasts[3], budget broadcasts[4], party political broadcasts[5], general election broadcasting[6], and the broadcasting of parliamentary matters[7], but further consideration of these lies outside the scope of this study[8]; and it is instead proposed to focus now on the licensing and regulatory controls which govern the media, operative in Nigeria itself.

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1 This does not refer to statements regarding Government policy, but rather official announcements, 'such as the calling up of certain classes of reserves in the armed forces': Street, ibid, p 90.

2 Street, ibid.

3 The relevant rules are contained in an agreement between the Conservative and Labour Parties and the B.B.C. of 3 April 1969, usually referred to as the 'aide-memoire'. This gives the Opposition a right of reply in certain circumstances. See Street, ibid, pp 90-92.

4 Both the B.B.C. and I.B.A. offer broadcast time to the Chancellor and to a spokesman nominated by the Opposition during budget week.

5 In terms of the 1947 aide-memoire, the allocation of broadcasting time for such material is decided by the Committee on Party Political Broadcasting, composed of 'two representatives each from the B.B.C., I.B.A. and the three main parties': Street, supra, p 92.

6 Arrangements for general election broadcasting are also made by the Committee on Party Political Broadcasting. The operation of the system is strongly criticised by Street, ibid, pp 93-94.

7 The televising of Parliamentary proceedings is still forbidden, but radio discussion of Bills going through Parliament has been allowed since 1955, subject 'only to the legal restraint that due impartiality and balance are maintained': Street, ibid, p 95.

8 For further details see Street, op cit, pp 84-104 and Paul O'Higgins, Cases and Materials on Civil Liberties, London, 1980, Chapter 11, pp 264-338.

## 4.3 Sources of the Nigerian Licensing and Media Regulation Laws

Nigerian laws relating to the licensing and regulation of the media are to be found entirely in local enactments, at both state and federal level. 'Wireless, broadcasting and television (other than broadcasting and television provided by the Government of a State),[1] is an item included within the Exclusive Legislative List[2], as is the 'allocation of wave-lengths for wireless, broadcasting and television transmission'[3]. By contrast, legislation regarding the press falls within the residual category[4]. It follows that legislation regarding radio and television broadcasting is the exclusive preserve of the federal legislature (except, of course, for the broadcasting services provided by State governments within the general framework so provided), whilst legislation regarding the press is exclusively within the competence of the states. The various state enactments regarding the press are, however, substantially similar.[5]

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1 This is listed as Item 64 of the Exclusive Legislative List, provided by Part 1 Second Schedule, Constitution of the Federal Republic of Nigeria, 1979.

2 For further information regarding the division of legislative power between federal and state legislatures, see the section on the Nigerian Constitution at p120 above.

3 See item 64, Exclusive Legislative List, supra.

4 T.O. Elias, 'Legal Requirements for Publishing a Newspaper,' in T.O. Elias, ed., Nigerian Press Law. London and Lagos, 1969, pp 1-15, p 1.

5 The notable exception is the Newspaper Law (Eastern States) Cap 86, which omits the important 'affidavit and bond' requirements, as further explained below.

Since the system of control applicable to the sound or electronic media is radically different from that pertaining to the press, is is proposed to deal separately with each in turn, beginning with the press. It is further proposed to outline all the important laws within each sphere; before attempting to identify the extent of executive control generated by the laws, or to assess their constitutionaliity.

## 4.4 Registration Formalities for Newspapers

In describing the registration formalities applicable to newspapers in Nigeria, it is proposed to focus attention on the requirements provided by the Newspapers Law of Lagos State[1], (which incorporates the Newspapers (Amendment) Law of 1964)[2]. Substantially the same formalities are prescribed in all other state enactments, and such differences as exist will be described in due course.

S. 2 of the statute defines 'newspaper' as meaning 'any paper containing public news, intelligence or occurrences or any remarks, observations or comments thereon printed for sale and published in Lagos periodically, or in parts or numbers; but, except in section 23[3], does not include any newspaper published by or under the authority

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1 Cap. 86 (Laws of Lagos State of Nigeria, 1973).

2 No. V of 1964. The former Lagos Newspapers Law - Cap 129- has now been combined with the provisions of the 1964 amending statute in the present Cap 86, supra.

3 S. 23 requires the consent of the Attorney-General before any criminal prosecution may be commenced against any proprietor, printer, or publisher or editor of a newspaper for any libel published therein. This requirement is further described in the context of criminal defamation in Chapter Seven below.

of the Government'[1].

The most important of the provisions is to be found in section 4 which states:

'No person shall print or publish or cause to be printed or published any newspaper unless the proprietor, printer and publisher shall each have previously -

(a) /sworn/... and registered in the office of the Minister an affidavit containing...:-

(i) the correct title or name of the newspaper;

(ii) a true description of the house or building wherein such newspaper is intended to be published;

(iii) the real and true names and places of abode of the persons intended to be the proprietor, printer, publisher and editor of the newspaper; and

(b) the proprietor, printer and publisher shall each have previously given and executed and registered in the office of the Minister a bond... in the sum of five hundred naira with one or more sureties as may be required and approved by the Attorney-General of the Lagos State[2].'

The form of the required bond is specified in the Schedule to the Act. Under the terms prescribed, the proprietor, printer and publisher must each undertake to pay the sum of five hundred naira to the Governor of the State, in the event of failure to pay any penalty imposed under the Newspapers Law, or any other law, or any damages and costs awarded in an action for libel[3].

The Minister may accept a cash deposit in lieu of the surety or sureties and may use the sum deposited to pay 'every penalty which may at any time be imposed by any court in Nigeria on the proprietor, printer and publisher or any of them'[4] - 'whether in respect of libel published

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1 s 2 Newspapers Law, Lagos State, Cap 86. In practice, therefore, the provisions described below do not apply to official Government publications, but do govern newspapers which are merely controlled (through share-holdings, etc) by state governments (or the various political parties)

2 s. 4, ibid.

3 Schedule, ibid.

4 s. 4(b)(1), ibid.

in the newspaper or otherwise'[1]. Any amount so paid out of the deposit must immediately be made good by the proprietor, printer and publisher; and failure to do so will result in the suspension of the newspaper until such time as this has been done[2]. If the deficit in the deposit is not made good, the Minister is empowered to retain the remaining balance for two years; and, if there are no civil or criminal proceedings pending against the proprietor, publisher or printer, may then return it to them[3]. The Minister is directed to invest sums so deposited with him in the Post Office Savings Bank, and to pay all interest accruing thereon to the person who deposited the sum with him[4].

A new affidavit must be sworn whenever there is a change in the proprietors, printers, publishers or editor; or if the title of the newspaper is altered[5]. A new bond may also be required in a number of circumstances: for example, if any surety dies, becomes bankrupt, leaves Lagos State without retaining there property sufficient to discharge his obligations under the bond, or withdraws from the suretyship[6]. Every bond required under the statute must be executed before a magistrate and at least one independent

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1 See Elias, op cit, p 2.

2 s 4(b)(ii) and (iii), Newspapers Law, supra.

3 s 4(b)(iv) ibid.

4 s 4(b)(v) ibid.

5 s 7 ibid.

6 s 9 ibid. Further provisions regarding the withdrawal of a surety are contained in s. 10, ibid. Following withdrawal, he remains liable in respect of any penalties incurred during his suretyship, and before his discharge.

witness[1]; and every affidavit registered in terms of the Law may be received and admitted 'as conclusive evidence of the truth of all such matters set forth in /it/' as are prescribed by the statute[2]. Moreover, once such an affidavit has been admitted in evidence, and a newspaper bearing the same title and the same names of printer, publisher and place of printing is produced in court, it is not necessary for the informant or prosecutor in any civil or criminal proceedings to 'prove that the newspaper to which such trial relates was purchased at any house, shop or office belonging to or occupied by the defendant..., or /to prove/ where such printer or publisher usually carries on the business of printing and publishing such newspaper, or /to establish/ where the same is usually sold'[3].

Penalties in relation to certain of the above provisions are prescribed by s 11 which states that:

> 'Any person who -
> (a) shall print or publish or cause to be printed or published any newspaper in contravention of section 4 or section 9; or
> (b) shall sell any newspaper which he knows or has reason to believe has been printed or published in contravention of either of the aforesaid sections,
> shall be liable to a fine of one hundred naira.'

The statute prescribes a number of further obligations, as follows:

(i) The true name and place of abode of the printer and publisher and of the editor (or editor in chief) and a

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1 s. 8, ibid.
2 s. 12, ibid.
3 s. 13, ibid.

true description of the newspaper's place of printing, must be inserted /at/ the foot of the last page of each copy of every newspaper, and at the foot of the last page of each copy of every supplement'.[1] Any person who prints or publishes a newspaper (or causes it to be printed or published) without including these particulars is liable to a fine of one hundred naira for 'every such publication'; any any person who sells such a newspaper 'knowing or having reason to believe' that it omits the required information, is liable to a fine of ten naira in respect of 'each such sale'.[2]

(ii) The printer and publisher of every newspaper are under a duty to deliver or post to the Minister, 'upon every day upon which such newspaper shall be published', a copy of every paper published (and of every supplement), which must be signed by the printer and publisher; and which are then kept on file by the Minister. The penalty prescribed for each failure by a printer or publisher to comply with these duties is a fine of ten naira.[3]

(iii) The editor is under an additional duty to sign and deliver or send to the Minister 'a copy of every newspaper and every supplement edited under his general supervision and control[4]'. In the absence of the editor himself, this duty must be performed by the acting editor[5].

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1 s 14(1), ibid.
2 s 14(2), ibid.
3 s 15(i), ibid.
4 s 16(1), ibid.
5 s 16(2), ibid.

If any newspaper is not delivered or sent to the Minister as required under these provisions, he may (notwithstanding any other proceedings taken by reason of such failure) 'by notice under his hand addressed to the printer, publisher or editor require him to deliver or send to him' the requisite copies, duly signed.[1] Failure to comply with such a notice is punishable, on summary conviction, by a fine of one hundred naira for every day on which such failure continues.[2]

Other miscellaneous provisions of the law include[3] those governing the institution of proceedings on any bond (following failure to fulfill its conditions)[4]; providing for the service of process upon any proprietor, printer, publisher or editor at the house or building where the newspaper is printed[5]; and obliging the proprietor and publisher of a newspaper printed or published outside Lagos State, but circulating within it, to establish an office (at which service of process may be effected) within Lagos State within two months of commencing such

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1 s 17(1), ibid.

2 s 17(2), ibid.

3 Other important provisions of the statute - notably s 21 (prohibiting the publication of false news) and s 23 (requiring the fiat of the Attorney-General for the commencement of prosecution for criminal libel against the proprietor, publisher, printer and editor of a newspaper) are further described at p 248 and 604 respectively. For further information regarding other provisions of the statute, see Elias, op cit, pp 1-7.

4 s 20, ibid. The Attorney-General may put the bond in suit against any person who has executed it. The amount recovered is payable into general revenue, except that any amount owing by way of damages and costs to a plaintiff must first be deducted and paid to him.

5 See s 24, ibid.

circulation[1]. Furthermore, the Minister has power to make regulations either to prescribe the fees payable for the registration of affidavits and bonds and certified copies thereof, or 'generally to give effect to the purposes of the Law'[2].

In the northern states, the governing enactment is the Newspapers Law[3], which is largely based upon the Lagos legislation examined above and is accordingly substantially the same in its provisions[4].

In the eastern states, however, the governing Newspaper Law[5] is different in a number of respects from its Lagos counterpart. Thus, newspaper is defined in s. 2 as meaning:

> '... any paper containing public news, intelligence or occurrences, or any remarks or observations thereon, printed in Nigeria and published or circulated for sale in Eastern Nigeria periodically or in parts or numbers at intervals not exceeding three months[6] between the publication of any two such papers, parts or numbers; also any matter printed in order to be displayed and made public periodically or at intervals not exceeding three months containing only or

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1 See s. 25, ibid. Failure to comply with this obligation is punishable on conviction by a fine of between twenty and fifty naira, or by imprisonment for a term of three months.

2 See s. 26, ibid.

3 Newspapers Law (northern states), Cap 80, (Laws of Northern Nigeria, 1963).

4 For further detail, see Elias, op cit, pp 7-8. In doing so, it should, however, be recalled that at the time when Elias was writing (1969), the Lagos enactments examined above had not yet been consolidated into one statute (as this was effected only in 1973).

5 Newspaper Law (eastern states) Cap 86 (Laws of Eastern Nigeria, 1963).

6 Cf the absence of any such time limit under the Lagos State Newspaper Law; but note the time-limit provided by s. 1 of the Newspaper Libel and Registration Act 1881, described at p 301 above.

principally advertisements[1]; but does not include any newspaper published by or under the authority of the Government'2.

Further, the eastern states' Newspaper Law breaks new ground by bringing news-agents within the ambit of its provisions. 'Newsagent' is defined as including 'any person who sells, whether for himself or on behalf of another, a newspaper in a shop, stall or other structure whether movable or not, but does not include a street hawker of newspapers'[3].

The Law provides for the establishment of a Registry Office and for the compilation (by the Registrar) of an Annual Register of newspapers, proprietors and newsagents.[4] Proprietors are accordingly required to render annual returns to the Registry Office 'stating the title of the newspaper and the names of all its proprietors together with their occupations and places of residence'[5]; and 'the same is /also/ required of all newsagents operating within the former Eastern Nigeria'[6].

All proprietors and publishers of newspapers produced outside the eastern states but circulating within them are required to establish an office within the area and

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1 Under the laws of Lagos State, the regulation of advertisements is instead provided by separate legislation. The eastern states Newspaper Law reflects the provisions of s. 1 of the Newspaper Libel and Registration Act 1881 in this respect as well.

2 s. 2, Newspaper Law, supra.

3 Ibid.

4 s. 3, ibid.

5 Elias, op cit, p 9.

6 Ibid.

to register it with the Registry Office. All changes of address of such office must be also duly registered. Failure to register within the specified period (one month from the date of first circulation[1]) is punishable by a fine of £25[2] or imprisonment for three months.

The 'penalty for selling newspapers that are not duly registered is a fine of £100[3] or six months' imprisonment'[4]; and the punishment for any 'conscious and wilful misrepresentation or omission... from returns required to be rendered'[5] is a fine of £100[6].

The name and address of the printer, publisher and editor of every newspaper and its supplement must be printed on every copy of it; and failure to do so renders the printer, publisher and editor (or the newsagent who sells a paper without such particulars) subject to a fine of £5[7] in respect of each such copy.[8] The printer and publisher of a newspaper are further required to deliver or send by post to the Minister a copy of every newspaper

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1 Or, (at the inception of the law) one month from the date of its coming into operation. This time period is plainly no longer relevant in practice.

2 Following the adoption of the naira as the unit of currency in Nigeria, this should now be read as ₦50.

3 Equivalent to ₦200.

4 Elias, supra, p 10.

5 Ibid.

6 Equivalent, again, to ₦ 200.

7 This is equivalent to ₦10.

8 s. 10, 11 and 12, Newspaper Law (eastern states), supra.

and supplement on every day of publication; and the penalty for non-compliance is a fine of £5[1] for each instance.[2] In addition, '/t/here are in s 14 the usual penalties for non-delivery after due notice has been given by the Minister to the printer or publisher'[3].

All newsagents are obliged to keep monthly accounts of all newspapers distributed by them and to submit these to their employers before the fifteenth day of the following month. Non-compliance is punishable by a fine of £100[3] or six months' imprisonment.[5]

The other major provisions of the Law are examined elsewhere in this study[6]; and it should be noted that, in a significant departure from the laws previously examined, the statute omits the requirement to lodge an affidavit and bond, as a pre-condition to publication.[7]

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1 Equivalent to ₦10.

2 s 13, supra.

3 Elias, op cit, p 10.

4 Equivalent to ₦200.

5 s 15, supra.

6 These are s 16 (rendering it an offence to publish false news) and s 18 (providing for the defence of 'apology' in respect of a libel contained in a newspaper provided certain conditions are met). These are discussed at p 249 and 521 respectively.

7 These requirements are discussed at p 308 above, in relation to the Newspapers Law of Lagos State. They are also found in the northern states Newspapers Law; whilst, in the western states, they apply to newspapers printed and published in those areas but not to newspapers which are merely circulated in the west, being printed and published elsewhere. The latter are simply subject to the same requirement as under the eastern states Newspaper Law, as further explained below.

The Newspapers Law[1] applicable in the western states is something of a mix between the Lagos State provisions and those applicable in the eastern states. 'Newspaper' is defined in broadly the same terms as in the Lagos enactment; but - in line with the eastern states' legislation - the Newspapers Law of the western states also brings newsagents within the ambit of its provisions, and defines these in the same terms as does the eastern states' provision.[2]

Thereafter, the Law is divided into two parts. The first substantially reproduces the Newspapers Law applicable within Lagos State, but limits the application of these provisions to newspapers published within the pre-1963 Western Region. The second part contains provisions substantially the same as those within the eastern states' Newspaper Law, and applies only to newspapers printed outside - but circulated within - the western states. The Law provides for the appointment of a Registrar; and it is to him that all obligations under the Law (whether under Part 1 or II) are owing.[3]

An amendment to the Law introduced in 1964 is examined further elsewhere in this study.[4]

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1 Newspapers Law (western states) Cap 81 (Laws of Western Region of Nigeria, 1959).

2 s. 2, ibid.

3 See Elias, op cit, p 12.

4 This relates to the publication of false news and is further examined at p 249. This amendment has, in any event, been repealed since 1967, as further explained at p 250.

## 4.5 Deposit of Newspapers with Libraries

Under the terms of the Publications Law[1], applicable in Lagos state, the publisher of a book (as broadly defined to include 'newspaper', as further explained below) is under a duty to deliver, within one month of publication, two copies of the book to the Minister (to be preserved as directed by the Executive Council) and two copies to the Library of the University of Lagos[2]. Failure to comply is punishable, on summary conviction, by a fine of ₦10.[3]

The definition of 'book' is extremely wide and includes, inter alia, 'every part or division of a book, newspaper, magazine, review, gazette, pamphlet /or/ sheet of letterpress'[4] but does not include a commercial advertisement.

The Minister has power to exempt any book or class of books from the provisions of this legislation.[5]

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1 Cap 107, (Laws of the Lagos State of Nigeria, 1973).

2 s. 3, ibid.

3 s. 4, ibid.

4 s. 2, ibid.

5 Elias cites the example of school magazines and school prospectuses which have been exempted in the northern states (where equivalent provisions are in force, as further explained below) under the Preservation of Copies of Books published in Northern Nigeria (Exception) Order, 1964, which came into force on December 4, 1964. See Elias, op cit, p 14, n 2.

As regards the other states within the Federation, it should be noted that 'almost identical provisions now exist in the Publications Laws of the former Northern[1], Western[2] and Eastern[3] Regions of Nigeria'[4].

## 4.6 Regulation of Printing Presses

Under the Printing Presses Regulation Law[5], applicable in Lagos State, no person may 'keep in his possession any press for the printing of books or papers who shall not have made and subscribed... /a/ declaration before a magistrate'[6] in which he specifies his name and the address at which the printing press is kept. Such a declaration must be forwarded by the magistrate concerned to the prescribed authority, who is responsible for maintaining a register of all such declarations. If a printing press is subsequently destroyed or becomes permanently unfit for use, its owner must report this occurrence to the prescribed authority and explain the reasons therefor[7]. 'Equally, whenever a press is sold or transferred to a new owner, the former owner must, within fourteen days, report to the

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1 Publications Law (northern states) 1964, no 13 of 1964.

2 Publications Law (western states) Cap 109, (Laws of the Western Region of Nigeria, 1959).

3 Publications Law (eastern states), Cap 109, (Laws of Eastern Nigeria, 1963).

4 Elias, op cit, p 14.

5 Cap 101, (Laws of the Lagos State of Nigeria, 1973).

6 s. 3, ibid.

7 See Elias, supra.

prescribed authority the date on which, and the name and address of the person to whom, the press was sold or transferred'[1]. The particulars of the new owner must then be entered in the register. Premises at which a declared press is kept may be visited by any police officer of or above the rank of Assistant Superintendent and by every administrative officer, during normal office hours, to ensure that the provisions of the statute have been carried out, but two days' written notice of the intended visit must be given[2].

Failure to declare a printing press in this manner is punishable by a fine of up to ₦100 or by imprisonment for a maximum of six months, or both; and - for the purposes of this provision - the 'occupier of any premises in which any such press is found /is/ deemed to have kept the same in his possession, unless he proves the contrary'[3].

Every book or paper printed within the Lagos State and intended for publication or dispersal must bear on the front (and last) page(s) - in legible characters in the English language - the name and address of the printer and (if the book or paper is published) that of the publisher as well, together with the place of publication. This obligation is separate and distinct from the similar duty prescribed by the Newspapers Laws, examined above,[4] and non-compliance is puhishable by a fine of ₦100 or imprisonment

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1 Elias, ibid.

2 This is in terms of Regulations made under s. 5 of the Act. See Elias, ibid, p 15, n 1.

3 s. 3(4) Printing Presses Regulation Law, supra.

4 See p 310 above.

for six months or both.[1]

Under s. 2 of the Law, 'book' is defined as including any volume... or... collection of printed sheets of paper... bound together; and 'paper' is defined as including any printed sheet of paper or similar material or any unbound collection of printed sheets of paper or similar material. 'Printed' means 'produced by printing, lithography, or any other like process', and 'printing' and 'printer' have corresponding meanings.[2]

As regards the remaining states within Nigeria, substantially the same provisions are to be found in the western states in the Printing Presses Regulation Law[3] and, in the northern states, in the Printing Presses (Regulation) Law[4]. No similar legislation obtains in the eastern states, however.[5]

## 4.7. Licence Requirements for Wireless Telegraphy

The regulation of wireless telegraphy in general is governed by the Wireless Telegraphy Act of 1961[6]. The Act - which has effect throughout the Federation[7] - begins by defining

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1 s. 4, Printing Presses Regulation Law, Cap 101.
2 s. 2, ibid.
3 Cap 97, (Laws of Western Region of Nigeria, 1959).
4 Cap 99, (Laws of Northern Nigeria, 1963).
5 See Elias, op cit, p 15.
6 No. 31 of 1961.
7 See s. 1(2), ibid.

"wireless telegraphy" as meaning:

'... the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electro-magnetic energy of a frequency not exceeding three million megacycles a second, being energy which either -
(a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not), or for the actuation or control of machinery or apparatus; or
(b) is used in connection with the determination of position, bearing or distance, or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class....'[1]

It needs little emphasis that this study is chiefly concerned with electro-magnetic energy which 'serves for the conveying of messages, sound or visual images'.[2]

The key provisions of the Act are sections 4 and 6. Section 4 makes it an offence to 'establish or use any station for wireless telegraphy or /to/ install or use any apparatus for wireless telegraphy except under and in accordance with a licence in that behalf'.[3] Section 6 confers upon the Minister[4] the sole right - in his absolute discretion[5] to 'grant licences for the purposes of th/e/ Act... for any particular case as he may approve and /to/... renew licences so granted'[6]. The Minister also has sole and absolute discretion as to the conditions upon which a licence

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1 s 2, ibid.

2 See s 2(d), ibid.

3 s 4(1), ibid.

4 Minister, in terms of section 2, ibid, means 'the Minister charged with responsibility for matters relating to wireless telegraphy'.

5 See s 6(2) which provides: 'The grant or renewal of a licence shall be in the discretion of the Minister'. No guidelines as to the manner in which this discretion is to be exercised are provided by the Act.

6 s 6(1), ibid.

may be issued and may accordingly impose 'limitations as to the position and nature of the station, the purposes for which, the circumstances in which, and the persons by whom the station may be used, and the apparatus which may be installed'[1]. The Minister may also specify the period for which the licence is to continue[2]; and may revoke a licence at any time by notice in writing (to a specific holder) or by publication in the Gazette (in relation to a class of licence-holders)[3].

In terms of section 7, the Minister may also prescribe the fee payable on the issue or renewal of a licence[4]; and, under s 9, may make regulations inter alia, 'prescribing the things which are to be done or are not to be done in connection with the use of any station for wireless telegraphy'[5], and 'imposing on the /licensee/...obligations as to permitting and facilitating the inspection of the station and apparatus'[6]. S 23 confers wide powers of entry and search of premises where 'a magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence under th/e/ Act has been or is being committed, and that evidence of the commission of the offence is to be found on any premises

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1 s 6(3), ibid.
2 s 6(4), ibid.
3 s 6(5), ibid.
4 s 7(1), ibid.
5 s 9(1)(a), ibid.
6 s 9(1)(b), ibid. For further details, see also subsections (c), (d) and (e) and subsection (2).

specified in the information'[1].

S 24 gives the executive wide-ranging powers to assume 'control over the transmission or reception of messages by wireless telegraphy'[2] either 'on the occasion of an emergency'[3] or (more generally) where this is 'in the public interest'[4]. In such circumstances, the Minister may prohibit the use of wireless telegraphy on board vessels or aircraft within or over Nigeria or her territorial waters;[5] may take possession of any apparatus for wireless telegraphy;[6] direct the licensee to submit to him all communications tendered for transmission or received by means of the apparatus;[7] and, in general, instruct the licensee to comply with all directions the Minister may think fit to give.[8]

In terms of s 25, the onus of proof of compliance with the Act is effectively shifted on to any person who is found in

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1 s 23(1), ibid. The terms of this section are long and complex, and full examination of them lies outside the scope of this study. For further information, however, see subsections (2) to (4).

2 s 24, ibid.

3 Ibid. No attempt is made to define 'emergency'.

4 Ibid. No indication is given by the Act of when the assumption of such control may be said to be 'in the public interest'. It seems therefore that the executive has complete discretion in this regard.

5 s 24(a), ibid.

6 s 24(b)(i), ibid.

7 s 24(b)(iii), ibid.

8 s 24(b)(v), ibid.

possession of any apparatus for wireless telegraphy - for such a person is 'deemed, until the contrary is proved, to have used the same'.[1]

Special provision for 'Government sound and television broadcasting services'[2] is contained in s 31. This empowers the Minister to grant to State governments 'licences to provide sound or television broadcasting services transmitting on such wavelengths as may be allocated'[3]. A licence granted pursuant to this power may be made subject 'to such conditions as the Minister may see fit to impose for the purpose of -

(a) ensuring a proper and efficient allocation of wavelengths throughout Nigeria; or
(b) giving effect to or ensuring compliance with the terms of any international convention relating to wireless telegraphy to which the Federation is a signatory; or
(c) avoiding undue interferrence with wireless telegraphy whether inside or outside Nigeria...'4.

No other conditions may however, be imposed by the Minister in relation to licences to State governments.[5] Furthermore the Minister may not refuse to grant a licence to a State government '/e/xcept in so far as it may in the opinion of the Minister be necessary or expedient for any of the purposes mentioned /above/... so to do'[6]. The Minister may cancel a licence to a State government by notice in writing but may only do so on grounds falling within (a) to (c) above.[7] In general - apart from the need to obtain a

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1 s 25, ibid.
2 s 31(1), ibid.
3 Ibid.
4 s 31(2), ibid.
5 Ibid.
6 s 31(3), ibid.
7 s 31(4), ibid.

licence, as described above - 'the provisions of the /Act/ /do/ not apply in relation to broadcasting or television provided by the government of a State'[1].

## 4.8 Regulation of Radio Broadcasting

The regulation of radio broadcasting is governed by the Federal Radio Corporation of Nigeria Act 1979[2] which came into retrospective effect from 1 April 1978. The statute repeals and replaces the Nigerian Broadcasting Corporation Act,[3], as amended,[4] under which the original Nigerian Broadcasting Corporation was established. In its place, the new Act provides for the establishment of a successor body corporate, the Federal Radio Corporation of Nigeria ('the Corporation') which has overall responsibility for national and external radio broadcasting services.[5]

The corporation is comprised of a Chairman and the following other members, all appointed by the Minister with the prior

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1 s 31(5), ibid. The significance of this important provision is further examined below.

2 (Decree) No. 8 of 1979.

3 Cap 133, (Laws of the Federation of Nigeria and Lagos, 1958).

4 The amending statutes in question are the Nigerian Broadcasting Corporation (Amendment) Acts of 1959, 1960 and 1961. Of these, the last is the most important and the change it introduced - still reflected in the present legislation - is discussed further at p 345 below.

5 See Explanatory Note to the Act (No. 8 of 1979).

approval of the Federal Executive Council:[1]

(a) the Chairman of each Zonal Board[2];
(b) the Director-General of the Corporation[3];
(c) one representative of the Federal Ministry of Information;
(d) one representative of the Ministry of External Affairs;
(e) one person to represent women's interests in Nigeria; and
(f) six persons with requisite experience in -
    (i) the mass media
    (ii) education
    (iii) management
    (iv) financial matters
    (v) engineering, and
    (vi) arts and culture'[4].

Members (other than public officials) hold office for three years and are eligible for further three-year appointment.[5] They may be prematurely removed from office (for misconduct

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1 s 140 of the 1979 Constitution establishes various federal executive bodies, with responsibility for a variety of functions as described in the Third Schedule to the Constitution. None of the enumerated functions assigned to these bodies appears entirely apposite to the present situation, and it is accordingly submitted that this role must now be performed by the Council of State, under its residuary powers. All future references to the Federal Executive Council should therefore be construed accordingly.

2 In terms of s 15 of the Act, ibid, the Corporation has four zones, each responsible for broadcasting in different languages, as provided in Schedule 2. The zones are Lagos, Kaduna, Ibadan and Enugu. All broadcast in English, but Lagos broadcasts also in three Nigerian languages (unspecified in schedule 2), whilst the three other zones broadcast, inter alia, in Hausa, Yoruba and Igbo respectively.

3 The Director-General is the chief executive officer of the Corporation and is responsible for the execution of the policy of the Corporation and its day to day business. He is appointed by the Minister with the prior approval of the Federal Executive Council. See s 4 of the Act.

4 s 2(1), ibid.

5 s 2(2), ibid.

or incapacity) by the Minister: with the approval of the Federal Executive Council and following consultation with the interests, if any, represented by the particular member.[1] In addition, the Corporation may recommend the removal of any member absent without acceptable explanation from two consecutive ordinary meetings of the Corporation or whose continued presence, in its view is 'not in the national interest or in the interest of the Corporation'[2]; and the Minister may thereupon 'declare the office of that member vacant'.[3]

The chief executive officer of the Corporation is the Director-General,[4] responsible for carrying out the policies of the Corporation and its day to day business. He is appointed by the Minister with the prior approval of the Federal Executive Council.[5]

The general functions of the Corporation are described in s 5 as follows:

> '5 - (1) It shall be the duty of the Corporation to provide as a public service in the interest of Nigeria, independent and impartial radio broadcasting services for general reception within Nigeria and to provide External Services for general reception in countries outside Nigeria.
>
> (2) The Corporation shall ensure that the services which it provides, when considered as a whole, shall reflect the unity of Nigeria as a Federation and at the same time give adequate expression to the culture, characteristics and affairs and opinions of each State, Zone or other part of the Federation.'[6]

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1 s 3(1), ibid.

2 s 3(2)(b), ibid.

3 Ibid.

4 See preceding page, n 3.

5 See s 4(1) and (2), supra.

6 s 5, ibid.

The particular functions of the Corporation are provided by s 7 and include the maintenance and operation of radio transmitting and receiving stations and of wired radio distribution services[1]; the planning and co-ordination of the activities of the Zones and of the entire Federal radio broadcasting system[2]; the collection and provision of news and information[3]; and the acquisition of copyrights and other materials and apparatus required[4].

In terms of s 8, the Corporation is enjoined to satisfy itself that the programmes broadcast by it and by the zones comply with the following requirements:

'(a) that nothing is included in the programmes which is likely to offend against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling, or to contain an offensive reference to any person, alive or dead;
(b) that the programmes maintain a proper balance in their subject matter and a generally high standard or quality;
(c) that any news given in the programmes is presented with accuracy, impartiality and objectivity;
(d) that due impartiality is preserved in respect of matters of political, or industrial controversy or relating to current public policy; and
(e) that subject to /the provisions described below/, no matter designed to serve the interests of any particular political party is included in the programmes...5'.

The last-mentioned limitation does not, however, prevent:

'(a) the inclusion in the programmes of properly balanced discussions or debates in which the persons taking part express opinions and put forward arguments of a political character; and
(b) the inclusion in the programmes of party political broadcasts... in accordance with /a/ scheme... which apportions the facilities and time allowed... the /various/ parties in such a manner as appears to the Corporation equitably to represent their respective claims to the interest of the public.6'

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1 s 7(a) and (b), ibid.
2 s 7(d), ibid.
3 s 7(h) and (i), ibid.
4 s 7(j) and (l), ibid.
5 s 8(1), ibid.
6 s 8(2), ibid.

The Corporation may not, however, express its own opinions on matters of political or industrial controversy or relating to current public policy.[1]

The Corporation is further obliged to provide such facilities 'as may appear to /it/ to be desirable in the public interest'[2] for the broadcasting of ministerial speeches[3] and of matters of any kind relating to the main streams of religious belief in Nigeria[4].

In addition, section 10 places the Corporation under a wide-ranging duty to broadcast government programmes. Thus, 'whenever so requested by an authorised public officer'[5] (meaning 'any officer in any of the public services in the Federation declared to be such by the President'[6]) the Corporation must broadcast (at its own expense) a Government 'programme'. No definition of 'programme' is provided and it cannot be assumed that the term is to be understood as being limited to 'announcement' - even though the latter word is used in the marginal note to the section. The Corporation is also under a duty, 'whenever so requested by any such officer in whose opinion an emergency has arisen or continues.../to/ broadcast... any other matter which the

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1 s 8(3), ibid,

2 s 9, ibid. This would seem to leave the determination to the Corporation in its own discretion. However, the value of this is largely eroded by the sweeping provisions of s 10, described below, in terms of which the Corporation is obliged to broadcast any Government programme at the request of authorised public officers.

3 s 9(a), ibid.

4 s 9(b), ibid.

5 s 10(1), ibid, emphasis supplied.

6 s 10(2), ibid. It needs no emphasis that this definition is wide in the extreme.

officer may request the Corporation to broadcast'[1]. The Corporation has a discretion in deciding whether to announce that the material in question has been broadcast at such request[2].

Certain items - notably federal news bulletins, Presidential speeches and 'other matters of national interest or importance which the Corporation requires to be so relayed'[3] - must be broadcast by all stations of the Corporation, in each of the four zones.[4]

Commercial broadcasting is restricted under s 11, whilst External Services are regulated under s 13. The establishment of the four zones - Lagos, Kaduna, Ibadan and Enugu - with their Zonal Boards and Directors is governed by ss 15 to 18 and the remaining sections of the Act deal, inter alia with the Corporation's power of entry onto land[5], its financial arrangements[6], the bringing of suit against it[7], its staff regulations and conditions of service[8], its Annual Reports[9] and the Regulations which may be made by the Federal Executive Council to ensure the proper carrying into effect of the provisions of the Act[10].

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1 s 10(1), ibid.
2 Ibid.
3 s 12(2)(b), ibid.
4 s 12, ibid.
5 ss 19 to 21, ibid.
6 ss 23 to 26, ibid.
7 ss 27 to 30, ibid.
8 s 32, ibid.
9 s 34, ibid.
10 s 35, ibid.

It remains to consider two further important provisions of the Act. Under s 6, the Corporation enjoys exclusive responsibility for radio broadcasting in 'shortwave or powerful medium-wave for effective and simultaneous reception in more than one State at any one time'[1]. Accordingly, any other broadcasting authority in Nigeria is limited to transmitting radio broadcasts for 'effective reception' in one state only[2] and any transmitters belonging to such other broadcasting authority which are capable of transmitting at a greater radius are deemed to be vested in the Corporation as from the day the Act came into operation[3]. This change brought about by the Act sparked considerable controversy and was strenuously objected to in Kaduna, where a powerful shortwave service had previously been established.[4]

Finally, under s 14, the Minister is empowered to 'give the Corporation directions of a general character or relating generally to particular matters (but not to an individual case) with regard to the exercise by the Corporation of its functions under th/e/ Act'[5] and it is 'the duty of the Corporation to comply with such directions'[6]. This provision reflects an amendment to the original Nigerian Broadcasting Corporation Act[7] which was introduced

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1 s 6(1), ibid.

2 Ibid.

3 Para 7, Schedule 3, ibid.

4 /1978 - 79/, Africa Contemporary Record, p B 740

5 s 14, Federal Radio Corporation of Nigeria Act, supra.

6 Ibid.

7 Cap 133, (Laws of the Federation of Nigeria and Lagos, 1958).

in 1961[1]; but goes somewhat further than its predecessor in certain respects, as further explained in due course.[2]

## 4. 9. Regulation of Television Broadcasting

Regulation of television broadcasting is provided by the Nigerian Television Authority Act of 1977[3] which came into operation, with retrospective effect, from 1 June 1976[4]. The Act provides for the establishment of a body corporate, known as the Nigerian Television Authority ('the Authority') which has exclusive responsibility for television broadcasting in Nigeria and has accordingly taken over television broadcasting facilities from all other broadcasting organisations previously established.[5]

The Authority comprises the following members, all appointed by the Federal Executive Council on the recommendation of the Minister, -

'(a) a Chairman;
(b) the Chairman of each Zonal Board[6];
(c) the Director-General of the Nigerian Television Authority[7];
(d) one representative of the Federal Ministry of Information;
(e) one person to represent women's organisations in Nigeria; and

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1 Nigerian Broadcasting Corporation (Amendment) Act 1961, Act no. 35 of 1961.

2 See p 345 below.

3 (Decree) No. 24 of 1977.

4 s 36, ibid.

5 See explanatory note to the Act, ibid.

6 For the purposes of television broadcasting, Nigeria is divided into six zones, as further explained at p 336 below.

7 The Director-General is the chief executive officer of the Authority, as further explained below.

(f) six persons with requisite experience in -
(i) the mass media,
(ii) education,
(iii) management,
(iv) financial matters,
(v) engineering, and
(vi) arts and culture.'[1]

Members, other than public officials, hold office for three years and are eligible for appointment for a further three-year term[2]; and may be prematurely removed from office in substantially the same circumstances as previously described in relation to members of the Federal Radio Corporation of Nigeria[3].

The chief executive officer of the Authority is known as the Director-General. He is appointed by the Minister with the prior approval of the Federal Executive Council and is responsible for 'the execution of the policy of the Authority and of its day to day business'[4].

The general duties of the Authority are 'to provide as a public service in the interest of Nigeria, independent and impartial television broadcasting for general reception within Nigeria'[5] and to ensure that the services provided 'reflect the unity of Nigeria as a Federation and at the same time give adequate expression to the culture, characteristics and affairs of each State, Zone or other part of the Federation'[6].

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1 s 2, Nigerian Television Authority Act, supra.
2 s 3(1), ibid.
3 See p 327 above; and s 4, ibid.
4 s 5, (1) to (3), ibid.
5 s 6(1), ibid.
6 s 6(2), ibid.

The particular functions of the Authority are described in s 8, and are substantially similar to those previously described in relation to the Federal Radio Corporation of Nigeria[1]. One notable difference (reflecting perhaps a shortage of locally produced television programmes) is the express provision that one of the functions of the Authority is to 'specify the types of programme which should be transmitted by the whole network and the quantity, type and contents of foreign materials'[2].

In terms of s 7 of the Act, the Authority is given responsibility 'to the exclusion of any other broadcasting authority or any person in Nigeria'[3] for television broadcasting within Nigeria; and has accordingly taken over this function from all federal and state television broadcasting stations previously established[4].

S 9 of the Act casts upon the Authority the duty to ensure, in broad outline, that its programmes maintain high standards of quality and taste, as well as accuracy, balance and due impartiality. The obligations in question are the mirror-image of those pertaining to the Federal Radio Corporation of Nigeria, previously described above[5], and their precise provisions will not be repeated here. The Authority is likewise under a duty to broadcast ministerial speeches[6]

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1 See p 328 above, and s 8, ibid.

2 s 8(1)(g), ibid.

3 s 7(1), ibid.

4 The Times (Special Supplement on Nigeria), 3 February 1982.

5 See p 329 above; and see also s 9, supra.

6 s 10(1), ibid.

and matters relating to the main streams of religious belief in Nigeria[1]; and may also be called upon to broadcast, at its own expense, any government 'announcement'[2] requested by an 'authorised public officer'[3] (meaning 'any officer in any of the public services in the Federation declared to be such by the President or /State Governor/'[4]). The broadcasting of any other matter may also be requested 'by any such officer in whose opinion an emergency has arisen or continues'[5]; and the Authority has a discretion as to whether or not to indicate that the material is being broadcast pursuant to such request[6].

Commercial television broadcasting is permitted in terms of s 12; whilst ss 14 to 17 provide for the establishment of six zones, each with its own Zonal Board and Managing Directors. Further provisions of the Act - substantially similar to those relating to the Federal Radio Corporation of Nigeria - entitle the Authority to enter upon land[7]; and govern its financial arrangements[8], the bringing of legal proceedings against it[9], the conditions of service

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1 s 10(2), ibid.

2 s 11(1), ibid. The wording of this subsection differs significantly from that of the equivalent provision (s 10) of the Federal Radio Corporation of Nigeria Act, discussed at p 330 above. Thus, this provision refers expressly to government 'announcement/s/', whilst the latter speaks simply of government 'programmes'. It seems therefore that the "television" provision is considerably narrower than the "radio" one in this regard.

3 s 11(2), ibid.

4 Ibid.

5 s 11(1), ibid.

6 Ibid.

7 ss 19 to 21, ibid.

8 ss 23 to 26, ibid.

9 ss 27 to 30, ibid.

of its employees[1]; its Annual Reports[2] and the Regulations which may be made by the Federal Executive Council pursuant to the legislation[3].

In addition, the Authority is made subject to the directions of the Minister under the terms of s 13, which provides that:

> 'The Minister may give the Authority directions of a general character or relating generally to particular matters with regard to the exercise by the Authority of its functions under th/e/ Act, and it shall be the duty of the Authority to comply with such directions'[4].

Finally, the Act also makes provision for the establishment of a news department, with responsibility for 'the gathering of items of news from all sources and for their editing and subsequent dissemination'[5]. The news department falls under the aegis of a Director of News, who is responsible - 'subject to any directions given to him by the Director-General'[6] - for 'the execution of the policy of the Authority in so far as the news department is concerned and for the administration of the day to day business of the department'[7].

## 4.10. Constitutional Regulation of Media Ownership

Under the 1979 Constitution, ownership and operation of the media is regulated by s 36(2), as follows:

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1 s 33, ibid.
2 s 31, ibid.
3 s 32, ibid.
4 s 13, ibid.
5 s 18(1), ibid.
6 s 18(2), ibid.
7 Ibid.

'(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever'[1].

A sharp distinction is thus drawn between the electronic and other media[2]. In relation to the latter, the Constitution provides clear protection against government monopoly; whilst radio and television broadcasting - by contrast - are expressly subjected to direct government control. It is noteworthy that the subsection provides no indication as to the conditions or criteria governing the grant of authority by the President: and the conclusion is thus inescapable that the discretion conferred upon the President in this regard is absolute.

## 4.11. The Extent of Prior Restraint and Government Control of the Media

It remains to consider the extent to which the provisions described above give rise to "prior restraint" and government control over the media. In examining this issue, it is proposed to scan in brief the laws previously outlined; and to highlight those aspects of their provisions which appear particularly controversial.

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1 S 36(2), Constitution of the Federal Republic of Nigeria, 1979. Subsection (1), of course, contains the substantive guarantee of the right to 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'.

2 It is interesting to note that 'any medium' in this provision has been interpreted to include not only the news media but also a school: See, for example, Ehimare v Governor of Lagos State and others, (1981)1 N.C.L.R. 166.

The affidavit and bond requirements imposed upon newspapers[1] clearly amount to a "prior restraint" against publication, in the sense that '/n/o person /may/ print or publish... any newspaper'[2] until these requirements have been satisfied. The obligation to swear and register the requisite affidavit does not, however, seem particularly onerous, and it is strongly arguable that it constitutes no more than a reasonable requirement for the proper maintenance of records which - at minimum - are of vital importance to any person wishing to bring proceedings against a newspaper, whether for defamation or otherwise. In this regard, it is interesting to note the view of the West Indian Court of Appeals in assessing the constitutionality (under a guarantee of freedom of expression modelled on the Nigerian provision as originally framed[3]) of similar obligations placed upon newspaper proprietors, publishers, printers and editors in Antigua[4]. The Appeal Court pointed out that '/t/he purpose of these provisions is obvious'[5] and that 'they are designed to ensure that responsibility for any breach of the criminal or civil law arising out of

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1 These are described at p 308 above.

2 s 4 , Newspapers Law, Lagos State, Cap 86 (Laws of Lagos State of Nigeria, 1973).

3 The original Nigerian Bill or Rights (now somewhat amended under the 1979 Constitution) served as a model for similar provisions introduced in the majority of new Commonwealth states in following years. See p 173 above.

4 The proceedings in question are those in Attorney-General and another v Antigua Times Ltd.,/(1973) , 20 W.I.R. 573 W.I.A.S./ which is further discussed at p 364 below.

5 Ibid, at 585, per Lewis, C.J. (Ag). The provisions in issue (as regards this aspect of the case) are contained in the Newspaper Registration Act, Cap 318, Laws of Antigua, 1962.

any matter published in a newspaper is easily and readily brought home to the offending party whose name and address will be known'[1] The court accordingly concluded that the provision 'is indeed a salutary /one/ as no community could be expected to tolerate the publication of a newspaper under conditions of anonymity'[2].

As regards the bond requirement, however, the matter is more controversial; and will be further examined in due course[3]. Suffice it therefore, for the present to note that the amount which must be guaranteed or deposited is not particularly high and - interestingly enough - is the same as the sum originally required when the predecessor to the present legislation (the Newspapers Ordinance of 1903) was first introduced in Nigeria.[4]

Other obligations imposed under the various Newspapers Laws - for example, to print the name and address and place of publishing on every newspaper[5], to send copies of newspapers to the Minister[6] and to submit annual returns giving details of newspapers, proprietors and newsagents[7] - do

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1 Ibid.

2 Ibid.

3 See p 364 below, where further aspects of Attorney-General and another v Antigua Times Ltd., supra, are examined.

4 See Elias, op cit, p 2 n 2. The present requirement of ₦500 is the equivalent of £250 - the sum required under s 3(2) of the Newspapers Ordinance of 1903.

5 See p 310 above.

6 See p 311 above.

7 See p 314 above.

not give rise to "prior restraint" or executive control of content and thus do not in themselves constitute any infringment of press freedom. As pointed out by Holland, '/w/e live in an age of records and statistics.../and/ /i/t is vital to know who is responsible for running a newspaper and where it is printed and published in case lapses occur in respect of which proceedings have to be taken'[1].

Likewise, the requirement that copies of newspapers be deposited with libraries[2] constitutes no infringement of press freedom and may, on the contrary, serve an important purpose in facilitating the collection and storage of reference materials.

The obligations imposed under the Printing Presses Regulation Laws[3] applicable in the various states (except those in the erstwhile Eastern Region[4]) are arguably more controversial. However, on a proper reading of the Laws, it is clear that they do not impose any form of prior licensing on the possession of a printing press. The statutes do not demand that the would-be printer first obtain permission for the acquisition of a press. Instead, they merely require that he notify the fact of his possession of a press to a magistrate - and that he also inform the registering authority when the press is no longer in use by him:

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1 Denys C. Holland, 'Freedom of the press in the Commonwealth', (1956) 9 Current Legal Problems, pp 184-207, p 194.

2 See p 318 above.

3 See p 319 above.

4 See p 321 above.

whether because it has been damaged or destroyed or because he has sold it to some other person.[1] It may of course, be queried why government needs information of this kind: but the obligation to provide it does not - in itself - infringe press freedom.

It is thus interesting to note that these provisions, as described above, do not establish a system of licensing of newspapers or printing in Nigeria. Nigerian legislation in this context differs markedly from that introduced in a number of other British dependencies; and the contrast merits emphasis in order to underline the comparative freedom obtaining in Nigeria. Thus, in Aden, the Press and Registration of Books Ordinance, 1939, as amended, provides: 'It shall not be lawful for any person to print, publish or edit any newspaper within the Colony unless authorised by a licence in writing granted by the Governor and signed by the Chief Secretary, which licence the Governor may, in his absolute discretion, grant, refuse or revoke'[2]. In the Federation of Malaya, a licence was required not only for the printing and publication of a newspaper, but also for the possession of a printing press; and thus the Printing Presses Ordinance, 1948, provided that: 'The Chief Secretary may in his discretion grant to any person in the Federation a licence to keep for use and to use a press for the printing of documents, and may at any time withdraw such licence either permanently or for such period as he thinks fit.'[3]

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1 See p 319 above.

2 s 5, Press and Registration of Books, Ordinance, 1939, cited by Holland, op cit, p 187.

3 s 3(1) Printing Presses Ordinance, 1948, cited by Holland, ibid p 188.

These provisions speak for themselves; and it accordingly needs no further emphasis that the obligations imposed in relation to newspapers and printing presses under Nigerian legislation are of an entirely different order. The bond and deposit requirements do, however, constitute a "prior restraint" against publication; and their constitutionality (in the light of the Nigerian guarantee of freedom of expression) is accordingly further examined in due course.[1]

The licensing requirement imposed by the Wireless Telegraphy Act of 1961[2] also constitutes a clear "prior restraint" on the dissemination of information by the electronic media. It must, however, be acknowledged that the number of frequencies available for broadcasting is limited; and that some form of licensing is accordingly essential to prevent 'intolerable overcrowding of desirable wave-bands'[3]. Even accepting the need for such regulation, however, the Nigerian legislation remains open to considerable criticism. The principal shortcoming of the Act lies in the absolute and unfettered discretion it confers upon the Minister in a number of key respects. Thus, the legislation gives no indication of the criteria to be taken into account by the Minister in deciding whether to grant or refuse a licence.[4] Likewise, the statute provides no guidance as to the conditions regarding the use of broadcasting stations which the Minister may impose.[5] Moreover, licences are granted for

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1 See p 364 below.

2 See p 321 above.

3 Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 14.

4 See p 322 above.

5 See p 323 above.

an unspecified period and are revocable at any time by the Minister; and - again - no indication is given by the Act as to the grounds on which revocation may be ordered.[1] In addition, the Minister's sweeping powers to assume direct control of broadcasting stations may be exercised not only 'on the occasion of an emergency' but also whenever this is 'in the public interest'; and the latter provision is intrinsically vague and extremely wide-ranging[2]. In short, thus, the Minister's discretion is indeed absolute; and the inference seems clear that those who wish to acquire and to retain a licence to broadcast by radio and television had best keep on his "right" side.[3]

In summary therefore, the licensing requirement under the Wireless Telegraphy Act 1961 constitutes a clear "prior restraint" against publication; and the absolute discretion conferred upon the Minister in exercising his functions under the Act carries with it a grave danger of executive control over the content of radio and television broadcasts. The constitutionality of these provisions is accordingly examined further in due course.[4]

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1 See p 323 above

2 See p 324 above.

3 It must, of course, be remembered that these provisions do not apply to state-owned broadcasting services. In relation to these, the criteria for the grant or revocation of a licence are expressly enumerated and the Minister has no further power of control. The significance of this is further considered below.

4 See p 375 below.

Under the Federal Radio Corporation of Nigeria Act 1979[1], government control over radio broadcasting services is clear. Not only do the members of the Corporation, including its chief executive officer (responsible for the execution of its policies and running of its day to day affairs[2]) consist entirely of government-appointees[3], but the executive's power of control is expressly confirmed by section 14 which provides that the Minister may 'give the Corporation directions of a general character... with regard to the exercise by /it/ of its functions'[4]. This power of direction was first introduced in 1961[5] in the midst of considerable controversy. Thus, The Service newspaper expressed the fear that the Nigerian Broadcasting Corporation ('the N.B.C.') - the predecessor to the present body - would 'cease to be either impartial or objective or independent'[6]; and little credence was attached to the Government's assurance that the only reason for the change was that it would bring the N.B.C. into line with other statutory corporations such as the Nigerian Ports Authority and the Railway Corporation (in relation to which similar powers of Ministerial direction already existed.[7]). It seems, moreover, that these fears were borne out by

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1 See p 326 above.

2 See p 328 above.

3 See p 327 above.

4 See p 332 above

5 This amendment to the then Nigerian Broadcasting Act, Cap 133, Laws of the Federation of Nigeria and Lagos, was introduced in s 4 of the Nigerian Broadcasting Corporation (Amendment) Act, 1961, no 35 of 1961.

6 The Service, September 9, 1961, cited by Ian K Mackay, Broadcasting in Nigeria, Ibadan, 1964, p 70.

7 Mackay, ibid, p 67.

subsequent events, particularly during the 1965 elections, in Western Nigeria[1], when - according to Nwabueze[2] - 'both the federal and regional broadcasting services daily blared out fraudulent results issued by Chief Akintola's N.N.D.P.- /having/ been instructed to take their report of the election results from Chief Akintola's office, instead of from the counting stations'[3].

Thus, notwithstanding the provisions in the Act which require the Corporation to exercise due impartiality, especially in matters of political controversy,[4] it is difficult to avoid the conclusion that government control over appointees to the Corporation, as well as the Minister's wide-ranging power of direction, must inevitably influence the way in which these obligations are discharged. The constitutionality of this control is accordingly further examined below.[5]

Under the Nigerian Television Authority Act of 1977[6], the position is substantially the same as that relating to the Federal Radio Corporation of Nigeria. Thus the Authority is comprised entirely of members appointed by the executive and is subject to a similar power of Ministerial direction.[7]

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1 See the section on the History of Nigeria, at p 96 above.

2 B.O. Nwabueze, Constitutionalism in the Emergent States, London, 1973.

3 Ibid, p 152.

4 See p 329 above.

5 See p 382 below.

6 See p 333 above.

7 See p 337 above.

In addition, the collection and dissemination of news by the Authority is expressly made subject to executive control, through the News Department headed by the Director of News.[1] It follows that the content of television broadcasting is also subject to considerable government control, and the constitutionality of this is likewise examined below.[2]

As regards the regulation of media ownership under the Constitution, the guarantee of the right of every person to own and operate any medium for the dissemination of information[3] is to be welcomed; but the proviso excluding the electronic media from this guarantee and subjecting the establishment of a broadcasting station to the authorisation of the President[4] clearly constitutes a "prior restraint" against publication. The 'constitutionality' of this restriction cannot, of course, be challenged; but the need for its amendment will nevertheless be considered in due course.[5] Before turning to examine this issue, however, as well as the constitutionality of the other legislative provisions identified above - it is salutary to note the markedly different approach taken in the United States of America to both licensing and regulation of the media.

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1 See p 337 above.
2 See p 385 below.
3 See p 337 above.
4 See p 338 above.
5 See p 386 below.

## 4.12. The Contrasting Approach of the United States

In the United States, licensing of print (as opposed to broadcast[1]) media has long been abolished. Following the refusal of the House of Commons in 1695 to renew press registration requirements in England itself[2], licensing lingered on in the United States for some further thirty years. The continuation of licensing was then challenged by James Franklin, the printer of the New England Courant; and though he suffered imprisonment twice for his defiance, 'licensing had to be acknowledged dead after his release in 1723'[3].

A twentieth-century attempt to reinstate a modified form of the licensing of old was held unconstitutional in a landmark decision of the Supreme Court in Near v Minnesota.[4]

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1 Different provisions apply to the broadcast media because of the fact that the frequencies suitable for broadcasting are limited, as further explained below.

2 See Nelson & Teeter, Law of Mass Communications, 3rd. ed., New York, 1978, p 18. The system of control of the press established in the sixteenth century by the Tudor monarchs and perpetuated by the Stuart kings had largely disappeared by the end of England's Glorious Revolution of 1689; and '/l/icensing and censorship in England died in 1695 when the House of Commons refused to renew the /Licensing Act/', as further explained at p 301 above.

3 See Nelson & Teeter, ibid, pp 21-2.

4 Near v Minnesota ex. rel. Olson, 283 U.S. 697 (1931).

This case involved a 'smear sheet', the Saturday Press, which charged law-enforcement agencies with dereliction in their duty to control gambling, bootlegging and racketeering in Minneapolis. Its language was extreme and it 'vilified Jews and Catholics'[1] Its publication was halted under a Minnesota statute 'authorising prior restraint of "nuisance" or "undesirable" publications'[2]. Its publishers appealed to the Supreme Court, contending that the statute was unconstitutional; and, by a majority of 5:4, the Court found in their favour.

Speaking for the Court, Chief Justice Hughes emphasised that the provisions of the Minnesota statute constituted 'the essence of consorship'[3] and stressed that 'the chief purpose of the constitutional guaranty'[4] had been to prevent such prior restraint. He was not prepared to concede that prior restraint could never be justified, for there were circumstances (involving the security of the nation, or the protection of public morals[5]) in which this might be

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1 Nelson & Teeter, supra, p 44.

2 Ibid. A permanent injunction against publication was imposed, subject to the proviso that publication could be resumed if the publishers could satisfy the court that the newspaper would no longer contain the objectionable material which contravened Minnesota's 'gag law'.

3 Near v Minnesota, supra at 713.

4 Nelson and Teeter, op cit, p 45, citing Near, ibid.

5 See Near v Minnesota, supra, at 716, where Chief Justice Hughes acknowledged that 'No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops... /or/ incitements to acts of violence and the overthrow by force of orderly government'. He also considered that 'the primary requirements of decency /might/ be enforced against obscene publications.

necessary. On the other hand, he also emphasised that:

'/T/he fact that the liberty of the press /might/ be abused by miscreant purveyors of scandal /did/ not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege'.[1]

Chief Justice Hughes further expressed particular concern at the need - not to shield officialdom from criticism - but rather to encourage a 'vigilant and courageous press'; for the increasing complexities of modern government as well as burgeoning crime and corruption rendered this ever more important.[2]

Near v Minnesota stands as a milestone in the development of freedom of the media in the United States. It was 'the first case involving newspapers in which the Court applied the provisions of the First Amendment against states through the language of the Fourteenth Amendment.[3] And it was to serve as important precedent for protecting the press against government's demands for suppression.'[4]

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1 Ibid, at 720, emphasis supplied.

2 Ibid See also p 719, where Chief Justice Hughes sketches the dangers in graphic terms.

3 The Court thus built upon the principle first recognised in the case of Gitlow v New York 268 U.S. 652 (1925) that 'freedom of speech and of the press - which are protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States': (See p 666). The importance of this was incalculable, for it established the competence of the Supreme Court to examine the constitutionality of State action infringing freedom of speech and of the press.

4 Nelson & Teeter, op cit, p 47.

Other indirect forms of licensing have also been ruled unconstitutional in the years since the Near decision. Thus, in Lovell v City of Griffin,[1] for example, freedom to distribute publications without the need for prior permission was confirmed by a unanimous Supreme Court. The appeal to the Court arose out of the conviction of Ms. Lovell, a Jehovah's Witness, for failure to obtain written permission from the City Manager of Griffin for the distribution of her religious tracts, as required by a city ordinance which prohibited the 'practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind without first obtaining permission from the City Manager...[2].

The Supreme Court was unanimous in denouncing the ordinance, declaring that it was 'invalid on its face' and that it '/struck/ at the very foundation of the freedom of the press by subjecting it to license and censorship'[3]. It made no difference that the ordinance was directed at leaflets and pamphlets rather than newspapers, for publications of the former kind 'have been historic weapons in the defense of liberty'[4]; and the press 'in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion'[5]. Nor did it matter that the ordinance related to distribution, rather than publication: for '"Liberty of circulating is as essential

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1 303 U.S. 444 (1938).
2 Ibid, at 447.
3 Ibid, at 451.
4 Ibid, at 452.
5 Ibid.

to... freedom /of speech/ as liberty of publishing; indeed, without circulation, the publication would be of little value"'.[1]

In Jones v City of Opelika[2], a further restriction on distribution was in issue: this time in the form of an annual licence (for which a $10 fee was payable) to register as a "Book Agent". It was contended (by Jehovah's Witnesses) that this licence tax (imposed by the City of Opelika in Alabama) 'could be a dangerous weapon of censorship because the license could be revoked at will by city officials'[3]. When the case first came before the Supreme Court, it held (by a majority of 5:4) that the Opelika Ordinance was valid, on the basis that it was in keeping with 'the preservation of peace and good order' and reflected the 'ordinary requirements of civilised life'[4]. Eleven months later, however, the Court (having heard more Jehovah's Witnesses' cases) reversed its previous ruling and held that the Ordinance was indeed unconstitutional. It emphasised that:

> '/T/he requirement of a licence for dissemination of ideas, when as here the licence is revocable at will without cause and in the unrestrained discretion of administrative officers, is... an unconstitutional restraint on those freedoms'[5].

The freedoms in issue were those of speech (and of religion); and the Court believed that 'the Constitution, by virtue

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1 Ibid. The Court was here citing its earlier dictum in Ex parte Jackson, 96 U.S. 727 (1877) at 733.

2 316 U.S. 584 (1942).

3 Nelson & Teeter, op cit, p 619.

4 Jones v City of Opelika, supra, at 594-595.

5 Ibid, at 600. The Court now 'adopted, as its majority position, the 1942 dissent in Jones v Opelika written by Chief Justice...Stone'. Nelson & Teeter, supra.

of the First and Fourteenth Amendments, ha/d/ put /them/ in a preferred position'[1]. Hence, '/t/he First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out'[2]. Rather, it confers protection against 'every form of taxation which... is capable of being used to control or suppress'[3] these freedoms.

Different rules apply, however, to the broadcast media - for the simple reason that the number of frequencies available for broadcasting is limited, and some regulation is accordingly essential. In the early years of radio broadcasting, no licensing restrictions were imposed; and '/b/y 1926, the limited number of frequencies available for broadcasting was unable to carry the traffic without intolerable interference among stations.'[4] The Radio Act of 1927 was passed at broadcasters' request; and established a Federal Radio Commission (FRC) to regulate broadcasting and ensure that it met the demands of 'public interest, convenience or necessity'[5]. All would-be broadcasters required a licence, for which application had to be made to the FRC. In 1934, the Communications Act was passed by Congress and established 'the Federal Communications Commission (FCC) under which radio and television have been regulated since'.[6]

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1 Ibid, at 608.
2 Ibid.
3 Ibid.
4 Nelson & Teeter, op cit, p 446.
5 Ibid.
6 Ibid.

The strong contrast between these controls and the freedom from licensing enjoyed by the print media prompted a challenge to the constitutionality of the Communications Act. In National Broadcasting Co. v United States[1], however, its validity was upheld - the Supreme Court emphasising:

'Unlike other media of expression, radio inherently is not available to all. That is its unique characteristic; and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied'.[2]

The Court adverted to the criteria provided by the Act for the grant or refusal of a licence - viz., 'public interest, convenience or necessity'; and confirmed that '/d/enial of a station licence on /those grounds/, if valid under the Act, is not a denial of free speech'[3].

Moreover, although censorship of programme content is barred under the Communications Act, it is recognised that 'there /are/ positive obligations upon the holder of a /broadcast/ license to operate in the public interest, obligations which /are/ not imposed upon the printed media'.[4] This was explained by the Federal Court of Appeals[5] on the following basis:

'A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable obligations. A newspaper can be operated at the whim or caprice of its owners, a broadcasting station cannot'.[6]

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1 319 U.S. 190, 63 S.Ct. 997, (1943).

2 Ibid, at 226.

3 Ibid, at 227.

4 Nelson & Teeter, op cit, p 447.

5 In Office of Communication of United Church of Christ v FCC, 123 U.S.App.D.C. 328, 359 F.2d 994, (1966).

6 Ibid, at 1003.

The difference between the obligations resting upon the print and broadcast media is vividly illustrated by contrasting the decision in Near v Minnesota[1] with that in Trinity Methodist Church, South v FRC[2]. In the former, the Supreme Court had stressed 'the primary need of a vigilant and courageous press' and had confirmed that:

> 'The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint.'3

By contrast, in Trinity Methodist Church, South v FRC,[4] a radio broadcaster's application for re-licensing was rejected on the grounds that his programmes 'attacked the Roman Catholic Church, were sensational rather than instructive, and obstructed the orderly administration of public justice'[5]. His appeal to the Federal Appeals Court was dismissed on the ground that the agencies established to regulate the airwaves have the right to refuse renewal to a broadcaster who has abused his licence by publishing 'defamatory or untrue matter'[6]. To hold the opposite would turn broadcasting from a benefit into a scourge; and since there was no automatic right to a licence to use the limited frequencies available, denial of a licence was 'neither censorship nor previous restraint, nor... a whittling away of the rights guaranteed by the First Amendment'[7].

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1 283 U.S. 697, 51 S.Ct. 625 (1931), previously discussed at greater length at p 348 et seq.

2 61 U.S.App.D.C. 311, 62 F.2d 850 (1932), certiorari denied 284 U.S. 685, 52 S.Ct. 204, 288 U.S. 599, 53 S.Ct. 317 (1933).

3 Near v Minnesota, supra, at 720.

4 Supra.

5 Nelson & Teeter, op cit, p 449. (The latter ground referred to the attacks on judges which he had broadcast).

6 Ibid.

7 Trinity Methodist Church, South v FRC, supra, 62 F 2d 850 (1932), at 853.

Broadcast licences are granted by the FCC, under the Communications Act of 1934, for (renewable) three-year periods on the basis of 'public convenience, interest or necessity'. An application for a licence may be challenged by other 'parties in interest' and the Commission is empowered to hold hearings to resolve the issues raised. The Commission issues policy statements and guidelines as to its criteria in granting licence applications. Its two principal considerations are 'the best practicable service to the public' and the 'maximum diffusion of control of the media of mass communications'.[1]

Detailed consideration of these criteria lies outside the scope of this study[2]. Under the first head, the Commission takes into account considerations such as 'citizenship, character,... financial, technical and other qualifications, ... full-time participation in station operation by owners, the proposed program service and the past broadcast record, the efficient use of the frequency, /and a catch-all criterion of/ "other factors"'.[3] The second major criterion is premised upon 'faith in the tenet of the self-governing society that truth emerges from the clash of differing ideas and opinions'[4]. Pursuant to this principle, the Commission has evolved a number of rules regarding the maximum number of broadcasting stations that may be controlled

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1 Nelson & Teeter, op cit, p 451.

2 For further information, see Nelson & Teeter, ibid, pp 450-468.

3 Nelson & Teeter, ibid, p 450-451.

4 Ibid, p 463.

by a single person or entity[1] and has also sought to limit 'radio-newspaper combinations'[2].

Once a broadcasting licence has been obtained, the licensee becomes subject to a number of important obligations (the fulfilment of which is always relevant to any application for renewal of the licence). The most important of these are the 'equal time', the 'seek out',and the 'personal attack' rules which are briefly described below.

Under the 'equal time' or 'equal opportunities' provision of the Communications Act, any broadcaster - if he allows 'a legally qualified candidate for any public office' to use his broadcasting station - must afford equal opportunities to use the station to all other such candidates for that office. Bona fide news programs covering the activities of such candidates are, however exempted from the rule.[3]

Under the 'seek out' rule, broadcasters are obliged to seek out and transmit contrasting viewpoints on controversial

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1 For example, in 1953, it formulated a 'concentration of control' rule which 'permits common ownership of no more than seven AM stations, seven FM stations, and seven television stations not more than five of which may be VFH'. See Nelson & Teeter, ibid, p 464.

2 Thus, in 1975, the Commission ruled that 'no future applicant would be permitted to own both a daily newspaper and a broadcasting station in the same community'. For a fascinating account regarding the controversy surrounding the position of existing radio-newspaper combinations, see Nelson & Teeter, ibid, pp 464-468.

3 Nelson & Teeter, op cit, p 470. This has been the position since 1959; and the difficulty in determining what constitutes such a news program is briefly canvassed at pp 471-472. The broadcaster has a choice as to whether he allows any such broadcast at all. He is not under a duty to do so, by contrast with the obligation imposed by the 'seek out' rule, described below.

issues of public importance, compliance with this duty being regarded by the Commission as a sine qua non for the renewal of a licence. This is in keeping with what is generally known as the 'fairness doctrine'; the principle that the 'public interest requires ample play for the free and fair competition of opposing views'.[1]

Considerable difficulty has been experienced in determining what constitutes a 'controversial issue of public importance' so as to be subject to the 'seek out' requirement.[2] Objection to the principle has also been voiced on First Amendment grounds as derogating from freedom of expression which (it is contended) 'includes the freedom to be unfair'.[3] An illustration of the rule is provided by the Commission's ruling in 1976[4] that a radio station centred in an area of extensive strip mining was obliged to seek out and broadcast contrasting viewpoints on this issue.

In terms of the 'personal attack' principle, when 'a broadcast attacks the integrity or character of a person or

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1 Ibid, p 472.

2 This is illustrated, inter alia, by the 'Pensions' case; Accuracy in Media, Inc., 40 F.C.C.2d 958 (1973), later cited as National Broadcasting Co. v FCC, 516 F.2d 1101 (D.C.Cir.1974), which raised the question whether the unsatisfactory operation of private pension plans was a 'controversial issue of public importance'. On appeal, it was held - reversing the view of the FCC - that it was not. For further examples, and clarification of the practical operation of the rule, see Nelson & Teeter, op cit, pp 474-482.

3 See Nelson & Teeter, ibid, p 474. It is plain that the print media enjoy such freedom - as illustrated by Near v Minnesota, 283 U.S. 697, discussed at p348 and 355 above.

4 See Representative Patsy Mink, 59 F.C.C.2d 987 (1976).

group, or an editorial supports or opposes a political candidate, the station must promptly notify the person attacked or opposed, furnish him with the content of the attack, and offer him air time to respond'[1]. Bona fide newscasts, news interviews and commentaries fall outside the ambit of this obligation: in recognition of the fact that 'the rules calling for notice, transcript and offer of time /might otherwise/ have the effect of discouraging stations from airing important controversial issues'[2].

The constitutionality of the fairness doctrine (incorporating both the 'seek out' rule and the 'personal attack' principle) was challenged-but upheld - in Red Lion Broadcasting Co. v FCC[3].

The Supreme Court ruled that the fairness doctrine was intra vires the powers delegated to the FCC by Congress[4]; and went on to confirm that there is a fundamental distinction between print and broadcast media and that - as regards the

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1 Nelson & Teeter, supra, p 482.

2 Ibid.

3 395 U.S., 367 (1969). This decision involved two cases, decided together under the Red Lion title. In the first, a broadcasting station, Red Lion, Pa., had refused to allow free time for the rebuttal of a personal attack, and went to court claiming that the fairness doctrine was unconstitutional. In the second, the National Broadcasting Co., (amongst others) challenged the validity of the costly notification procedure under the 'personal attack' rule.

4 In 1959, Congress had amended section 315 of the Communications Act to provide that stations must 'operate in the public interest and... afford reasonable opportunity for the discussion of conflicting views on issues of public importance'. Although no express provision was made for the 'personal attack' rule, there was no reason to consider the rule out of step with the general requirement for the airing of contrasting views on important issues. Hence, the 'personal attack' rule was not an unconstitutional exercise of the FCC's powers. See Red Lion Broadcasting Co v FCC, supra at 385.

latter - the First Amendment interest in free speech lies primarily with the public, rather than the broadcaster. Accordingly, the court declared:

'/T/he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee...It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.'[1]

Despite its confirmation by the Supreme Court, the fairness doctrine continues to attract considerable controversy[2]; and, with changes in broadcasting technology, especially the introduction of cable television, its underlying premise - the limited number of frequencies available for broadcasting - may no longer be tenable. Accordingly, the time may indeed have come for a fundamental reevaluation of the doctrine and its consistency with First Amendment guarantees - as indicated in the dissenting opinion of Judge Bazelon in the Court of Appeals in the Brandywine-Main Radio case[3]. Here, Judge Bazelon - disagreeing with the majority decision to uphold the refusal of an application for a broadcasting licence renewal[4] - emphasised the enormous

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1 Ibid, at 390.

2 See Nelson & Teeter, op cit, 485-486. The constitutional question dies hard among journalists, many of whom believe that these rules cannot be reconciled with free speech.

3 Brandywine-Main Radio, Inc.,25 R.R.2d 2010; Brandywine-Main Line Radio v FCC, 473 F.2d 16, (D.C.Cir.1972).

4 The FCC had refused to renew the broadcasting licence on the grounds of past failure to comply with the fairness doctrine. The Court of Appeals preferred, however, to base its decision (in confirming the refusal) on misrepresentations made by the broadcaster. One of the judges favoured refusal for both misrepresentation and violation of the fairness doctrine. The second joined him only on the ground of misrepresentation; and the third - Judge Bazelon - dissented altogether.

capacities of cable television and queried whether 'ancient assumptions and crystallized rules have blinded all of us to the depth of the First Amendment issues'[1] raised by the fairness doctrine. There is clearly considerable force in this contention. The rationale for applying different rules to the broadcast media and subjecting them to far greater regulation than traditional print media has always been the limited availability of broadcast frequencies. Once that consideration falls away, the retention of controls over broadcast media (of a kind not tolerated in relation to print) is difficult to justify.

In summary it is submitted that the approach of the United States - especially as regards the print media - is fundamentally sound. So long as the press remains subject to licence requirements and the grant or refusal of a licence lies within the sole and arbitrary discretion of state authorities, freedom of the press must always be illusory. Freedom from licensing is thus, undoubtedly, the first and foremost requirement for freedom of the media.

As regards the broadcast media, it is submitted that - for as long as reliance must be placed on limited frequencies for transmission[2] - the approach adopted by the United States is the most favourable possible.. There are undoubtedly difficulties in the practical application of the criteria for the grant of a licence and in enforcement of the

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1 Brandywine-Main Line Radio v FCC., supra, at 64.

2 Once cable television, for example, becomes more widespread, there will be no further need for these controls and the broadcast media should then be assimilated to print media in this regard.

duties of 'fairness' - but this is far preferable to allowing a state or private concern to monopolize the airwaves. The impact of television and radio[1] is enormous - and it is vitally important to secure the dissemination - through these powerful media - of as great a diversity of viewpoint as is possible.

The approach adopted in the United States thus stands in marked contrast to that presently applied in Nigeria. As regards the print media, it shows a clear and uncompromising commitment to the principle prohibiting "prior restraint". As for the electronic media, it reveals a sound and salutary attempt to overcome the problems of monopoly control and to enjoin upon the media a sense of their social responsibilities. Once technological advance renders the electronic media as freely and generally available as the print media then, of course, the prohibition of "prior restraint" and freedom from regulation should apply equally to the former as it does now to the latter. Until that time, however, the present distinction in treatment has merit: and the principles governing both branches of the media seem well worth following. It is submitted that the lessons to be learned from the United States' approach should accordingly be borne in mind in examining the important remaining issue: the constitutionality of the Nigerian provisions under the guarantee of freedom of expression contained in the Bill of Rights.

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[1] The impact of radio is especially significant in a country, like Nigeria, where television broadcasting is still limited, and both media have immeasurable importance in a society still largely illiterate.

## 4.13. Constitutionality of "Prior Restraint" and Government Control of the Media

Under the 1979 Constitution of Nigeria, freedom of expression 'including freedom to hold opinions and to receive and impart ideas and information without interference' - is guaranteed by section 36. The right to freedom of expression is not, however, absolute; and hence may be curtailed by laws 'reasonably justifiable in a democratic society' for a number of purposes.[1] Those relevant in the present context are contained in sections 36(3)(a) and 41. Thus, the former authorises derogation from freedom of expression by 'any law that is reasonable justifiable in a democratic society... for the purpose of... regulating... wireless broadcasting /or/ television'[2]; whilst the latter preserves the validity of 'any law that is reasonable justifiable in a democratic society -

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons'[3].

In the light of these provisions, it now remains to examine the constitutionality of "prior restraint" and government control over the media in Nigeria, as previously identified.[4]

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1 See the section on the Guarantee of Freedom of Expression at p 201 above.

2 s 36(3)(a), Constitution of the Federal Republic of Nigeria, 1979.

3 Ibid, s 41.

4 See the discussion at p 338, et seq.

4.13.1. The Constitutionality of the Bond Requirement for Newspaper Publication

As regards newspaper publication, the principal[1] "prior restraint" is the requirement to deposit with the Minister (or guarantee by way of bond) the sum of ₦500 (to be used for the payment of any penalties or damages awarded against a newspaper), as a condition precedent to the commencement of publication.[2] This obligation is prima facie a violation of the freedom to 'impart ideas and information without interference' guaranteed by s 36(1) of the Nigerian Constitution of 1979. The crucial question, accordingly is whether the provision is 'reasonably justifiable in a democratic society... for the purpose of protecting the rights and freedoms of other persons', as provided by s 41(1)(b).[3] In answering this question, an important (if disturbing) precedent is provided by the case of Attorney-General of Antigua and another v Antigua Times Ltd.;[4] The decision has importance for Nigeria because it concerned the constitutionality (under a guarantee of freedom of expression modelled upon and substantially similar to the Nigerian provision[5]) of a deposit requirement

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1 The 'affidavit' requirement - described at p 308 above - is also a "prior restraint" against publication; but itself does not infringe freedom of expression as previously explained.

2 This requirement has been more fully explained at p 308 et seq

3 See the section on the Guarantee of Freedom of Expression at p 201above; and see also the terms of section 41 as reproduced above.

4 /(1973)20 W.I.R. 573 W.I.A.S./ and/1976/A.C.16 (P.C.).

5 The Antiguan guarantee of freedom of expression is modelled on the Nigerian Bill of Rights which - as previously explained at p 173above- provided the basis for similar Bills introduced in a great many new states of the Commonwealth on their attainment of independence.

analogous (though more onerous[1]) than that applicable in Nigeria; and because it was ultimately decided by the Judicial Committee of the Privy Council which (in cases of this kind) has highly persuasive authority in Nigeria.[2]

The decision raises a number of issues[3], but that relevant to the present inquiry is the constitutionality of the Newspaper Surety Ordinance (Amendment) Act 9/1971 ('Act 9/1971'). This added to the existing bond requirements (substantially similar to those in force in Nigeria[4]), the further obligation

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1 The difference in terms is further explained at n 4 and p 370. From the viewpoint of the decision's value as a precedent in Nigeria, it is clear that if a more onerous obligation is held constitutional, a fortiori a less burdensome duty must also be considered within the limits of the 'freedom of expression' guarantee.

2 It will be recalled from the section on the Sources of Nigerian Law at 154 above that only decisions of the Privy Council on appeal from Nigeria (before such right of appeal was abolished in 1963) are binding on Nigerian courts. However, decisions of the Board interpreting similar provisions in the law of other Commonwealth countries clearly have considerable weight in Nigeria).

3 These include the constitutionality of a licence requirement for newspaper publication and of an annual licence fee (of $600) introduced by further amending legislation: the Newspapers Registration (Amendment) Act 8/1971 ('Act 8/1971'); and the constitutionality of an unfettered and unregulated discretion vested in the executive, as further discussed at p 378 below. The trial court and the West Indies Court of Appeal found Act 8/1971 unconstitutional because it prima facie infringed the Antiguan guarantee of freedom of expression and had not been shown by the state to be 'reasonably required' to further an interest recognised by the Constitution. The Privy Council on further appeal found the Act valid, on the basis that the company challenging its validity had provided insufficient evidence that it was not 'reasonably required' to promote such an interest. The decision thus raises in acute form the problem presented by the doctrine of constitutionality previously discussed in the section on the Nigerian Bill of Rights at p 191 above; and further briefly discussed at p 371 below.

4 Except that the sum required was slightly less, being $960 approximately ₦400; as opposed to the Nigerian requirement of ₦500. See Newspaper Surety Ordinance, Cap 319, Laws of Antigua, 1962.

to deposit, in cash,[1] the sum of $10,000 (equivalent to £2,100) with the Accountant-General, as a pre-condition to the printing or publishing of any newspaper. The purpose of the deposit was stated to be 'to satisfy any judgment of the Supreme Court for libel given against the /publishers/ of /such/ newspaper'[2]. Following the introduction of this obligation, Antigua Times Ltd., (the publisher of a bi-weekly newspaper called the Antigua Times, which had started up approximately one year previously) was compelled to cease publication, as the company could not afford the cash outlay required[3] which (so it was estimated) would have taken 'about six months with a circulation of 350,000 newspapers'[4] to recover. The company accordingly contested the constitutionality of the statute under the Antiguan Bill of Rights which guarantees 'the freedom... to receive and impart ideas and information without interference', subject to laws 'reasonably required' to protect certain

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1 The deposit had to be paid in cash; unless the Minister - in exercise of the discretion conferred on him by the Act (as described in n 2 below)-waived this requirement, being satisfied with the security offered in lieu.

2 Attorney-General v Antigua Times, /(1973)20 W.I.R. 573 W.I.A.S./, at 590, where the terms of the amending legislation are reproduced. The Act further provided that 'the Minister responsible for newspapers on being satisfied with the sufficiency of the security in the form of a Policy of Insurance or of a guarantee of a Bank may waive the requirement of the said deposit'. The West Indian Court of Appeals considered that this gave the Minister an unfettered and unregulated discretion in this regard, which the court held unconstitutional. The Privy Council, by contrast, thought that the Minister's discretion was limited and that he was governed in exercising it by the objective criterion of the sufficiency of the guarantee tendered. The constitutionality of an unfettered executive discretion (as considered in this and other authorities) is examined further at p378 below.

3 The $600 licence fee required under Act 8 of 1971 was, of course, also a contributing factor. Thus, Antigua Times Ltd testified that it was the prospect of having to find both sums which prompted its decision to close the paper.

4 Supra, at 591.

interests, such as the 'rights and reputations of others'[1]. The trial court found the statute unconstitutional; and so too did the West Indies Court of Appeal. On further appeal to the Judicial Committee of the Privy Council, however, the Board upheld the constitutionality of the legislation. The conflicting decisions of the latter tribunals accordingly merit some examination.

The West Indies Court of Appeal based its judgment[2] on the premise that:

> 'Once it has been established that /a statute/ is prima facie a violation of s 10 of the Constitution (/which may be/ apparent on the face of th/e/ enactment itself), then the burden shifts to the /state/ (a) to show that th/e/ Act comes within the permissible limits imposed by s 10(2)[3] of the Constitution and (b) to place before the court all relevant facts and materials to show that its enactment was reasonably required[4,5].

Applying this principle to Act 9/71, the court[6] was satisfied that it was prima facie unconstitutional as the financial burden it imposed 'not merely hindered but /had/ actually

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1 Ibid, at 577, where the terms of the guarantee of freedom of expression in Antigua, contained in s 10 of the Antigua Consititution Order 1967 (S.I.1967 No 225) are reproduced.

2 This is reported at /(1973)20 W.I.R. 573 W.I.A.S./.

3 s 10(2) authorises substantially the same derogations from the guarantee of freedom of expression as are permitted under the Nigerian Constitution.

4 In terms of s 10(2),, the test to be satisfied is whether the law in issue is 'reasonably required' to protect a recognised interest. This is a stricter test than the one applicable in Nigeria, where the question is whether the law is 'reasonably justifiable in a democratic society'. From the viewpoint of the value of the Antigua Times case as a precedent in Nigeria, it is clear that a statute which is found to satisfy the more rigorous test of the Antiguan Constitution is a fortiori more likely to pass the more flexible test applicable in Nigeria.

5 Attorney-General v Antigua Times, supra, at 587, per Lewis, C.J. (Ag.).

6 It is interesting to note that even the dissenting Peterkin, J.A. (Ag.), agreed on this point. See Attorney-General v Antigua Times, supra, at 607.

rendered impossible the... enjoyment of /the/ right /to freedom of expression/ in that it /had/ resulted... in the closure of /the/ newspaper'[1]. The onus accordingly shifted to the state to show that the legislation fell within the permitted derogations and was 'reasonably required' for the purposes so authorised. In this regard, Lewis, C.J. (Ag.), opined that 'the satisfaction of /a/ judgment /for libel/ is not essential to the protection of /the plaintiff's/ reputation, /but/ is merely incidental to the exercise of the right of action, and /that/ it is the right of action itself which gives the true protection to the injured person's reputation'[2]. Furthermore, as regards the discretion vested in the Minister to waive the deposit requirement on the provision of suitable security[3], the Act made no attempt to specify the 'policy considerations'[4] which should guide the Minister in exercising his discretion; and, accordingly, in so far as the Act conferred on him an unfettered and unregulated discretion, it was also unconstitutional[5]. Finally, there was no evidence that the deposit requirement was 'reasonably required' to protect the rights and reputations of others, as it seemed that only three libel actions had been brought in Antigua in over a decade and there was no evidence that damages had not in fact been paid in any one of these.[6] Act 9/1971 was therefore unconstitutional.

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1 See ibid, at 591.

2 Ibid, at 591. For comment on this view, see p 372 below.

3 See p 366 above, where the terms of the discretion given are described.

4 Attorney-General v Antigua Times, supra, at 592.

5 See ibid, at 593.

6 See ibid.

The Attorney-General and Minister of Home Affairs appealed against this decision to the Judicial Committee of the Privy Council, which adopted a radically different approach.[1] Far from accepting that the onus shifted to the state to prove the constitutionality of laws prima facie in conflict with the guaranteed rights, the Judicial Committee stressed that 'the proper approach... is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required'[2].

Adopting this approach, the Board found that no evidence had been adduced to rebut the presumption that Act 9/1971 was 'reasonably required'[3]. On the contrary, the Board disagreed with Lewis, C.J. (Ag.),'s view that it is 'the right of action /rather than the recovery of damages/ which gives the true protection to the injured person's reputation'[4]. The Judicial Committee emphasized that damages are designed to compensate for the injury suffered by the person libelled; and pointed out that he may be deterred from instituting proceedings unless 'there is a reasonable prospect of his obtaining the damages awarded to him and of payment of his costs'[5]. In addition, so their Lordships declared, 'the fact that the deposit will be used to satisfy a judgment for libel and that, if it is, it must be replenished by them,

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1 See Attorney-General and another v Antigua Times Ltd., /1976/ A.C. 16 (P.C.)

2 Ibid, at 32.

3 See Attorney-General v Antigua Times, supra, at 33. The Board also confirmed the constitutionality of Act 8/1971 - imposing a licence requirement as well as an annual licence fee - on the ground that there was nothing to indicate that the law was not reasonably required in the interests of public safety, order, morality and health.

4 Ibid.

5 Ibid, at 34.

is an inducement to the publishers of a newspaper to take care not to libel and to damage unjustifiably the reputation of others[1]'. Accordingly, (having further ruled that the discretion conferred on the Minister by the Act was not 'unfettered and unregulated', but, rather, was 'limited to determination of the sufficiency of the security offered'[2]), the Board concluded that there was 'no valid reason... for holding that the presumption that th/e/ Act... was reasonably required /had been/ rebutted'[3].

If this opinion of the Judicial Committee is followed in Nigeria, the bond requirements imposed by the Newspapers Laws - which are less onerous in a number of respects than the deposit requirement prescribed in Antigua[4] - must clearly be regarded as constitutional, under the more flexible Nigerian test of whether a law is 'reasonably justifiable in a democratic society' to promote a recognised interest. As previously stated, Privy Council decisions interpreting constitutional guarantees similar to those found in Nigeria are generally regarded as highly persuasive. Should the Nigerian bond requirements accordingly be accepted

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1 Ibid.

2 Ibid, at 33. This aspect of the judgment is considered further at p 378 below, in relation to the constitutionality of the Wireless Telegraphy Act of 1961.

3 Ibid, at 34.

4 Thus, the sum demanded under Nigerian law is considerably less (and, as previously noted at 340 above, has not been increased since 1903). In addition, the Nigerian provisions entitle the newspaper publisher, etc., to provide sureties instead of paying cash - whereas the Antiguan law demanded cash, unless the Minister, in the exercise of his discretion, accepted a guarantee instead.

as constitutional, notwithstanding the "prior restraint" they impose upon newspaper publication? It is submitted that they should not: for the opinion of the Board in the Antigua Times case is open to considerable criticism, and therefore should not be followed in Nigeria.

First and foremost - though this is a criticism of general import, not confined to the specific issue of the validity of deposit requirements - it is submitted that the Judicial Committee erred in its application of the doctrine of constitutionality. The approach applied by their Lordships places an extremely heavy burden of proof on the person challenging the validity of legislation, for not only must the challenger prove a negative (that the law is not 'reasonably required') - a burden which is always more difficult in practice to discharge than the proof of something positive - but he must also overcome the difficulty that evidence as to the underlying need for legislation is inevitably more readily accessible to the state than to the ordinary citizen. Moreover, the presumption of constitutionality threatens the general principle that exceptions to a rule should be narrowly construed; and seems to ignore the crucial point that constitutional guarantees of fundamental rights are designed to protect minorities against injury by majorities who would otherwise (under the Westminster system of government[1]) always be able to impose their will upon the former. Hence in the sensitive area of guaranteed rights, the presumption of constitutionality

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[1] Under the Westminster system, the general rule (with the exception of entrenched provisions) is that legislation is passed by simple majority.

(rightly applicable to other legislation) should not be allowed to prevail[1].

Moreover, criticisms specifically directed to the 'deposit' question include the following. First, the Board appears to have accorded scant regard to the practical outcome of their decision (which was to limit newspaper publication to those - unlike Antigua Times Ltd - who could afford to pay the substantial sums required[2]); and seems entirely to have ignored the important local insights of the lower courts - both of which had agreed that the statutes contravened the guarantee of freedom of expression.

Secondly, the Board ignored the point stressed by the West Indies Court of Appeal that very few libel actions against newspapers had been brought in the past and that there was no evidence that damages had not been paid in any of these[3]. Furthermore, whilst there is some force in their Lordships' view that a right of action for defamation is not sufficient to secure redress and that compensation and recovery of costs are also required, the Judicial Committee

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1 It thus needs little emphasis that the approach adopted by the West Indies Court of Appeal to the doctrine of constitutionality - as described at p 367 above - is far to be preferred. This approach, contrary to the view of one commentator on the case, does not concentrate exclusively on subsection (1) of the guarantee, but gives due weight to both the substantive right and the permitted derogations: casting the onus first on the challenger to show prima facie violation of the right; and then on the state to show that the derogation is nevertheless authorised by the constitution and is reasonably required. Thus, the criticism of Margaret DeMerieux, 'The Delineation of the Right to Freedom of Expression', /1980/ Public Law, pp 359 - 366, especially at p 364, is misconceived.

2 The point has possibly less force in Nigeria where the sum demanded is ₦500 (about a quarter of that required in Antigua). However, to a "fringe" newspaper or magazine commencing publication, the sum required may be a substantial financial burden.

3 See p 368 above.

ignored the fact that the risk of a judgment obtained remaining unsatisfied is one which faces all litigants - and that there is no reason to give preferential treatment to the plaintiff in defamation proceedings against a newspaper.

Thirdly, the Privy Council seems to have been fully alive to the impetus to self-censorship inevitably engendered by the obligation to maintain a "damages for defamation" fund at the prescribed level - but seems (most disturbingly) to have welcomed this consequence.[1] In this regard, it is salutary to note the fears expressed by the International Press Institute that 'the danger of such provisions is that 'the printer or publisher, for fear of forfeiting his deposit, may be led to interfere in editorial matters and seek to prevent the editor from printing matter which he considers perfectly legitimate'"[2]. The result of this, in the words of the International Press Institute, is that 'the printer or publisher assumes the role of unofficial censor'[3]. In such circumstances, freedom of expression must inevitably suffer: a reality which the Privy Council seems entirely to have overlooked.

Finally, the opinion of the Judicial Committee takes no account of a fundamental objection of principle to deposit requirements of this nature. As emphasised by Dicey[4], it is a cardinal rule of common law that 'no man is punishable

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1 See p 369 above.
2 (1955) I.P.I. Survey, No. IV, pp 27-28, cited by Holland, op cit, p 195.
3 Ibid.
4 Dicey, op cit.

except for a distinct breach of the law'[1]; and deposit requirements of the kind here in issue 'are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence'[2]. It is most disturbing that their Lordships should entirely have failed to consider this aspect of the legislation.

It is thus submitted that these criticisms of the Judicial Committee's opinion are sufficiently strong and cogent to take from it the persuasive authority normally accorded in Nigeria to Privy Council rulings on such questions. Accordingly, should the validity of the bond requirements be challenged in future, the Nigerian courts should decline to follow this Privy Council authority. Furthermore, it should be recognised that the bond requirements are intrinsical unacceptable - for all the reasons described above: the fact that they limit newspaper production to those who are able to pay (or provide sureties for) the sums required; the unwarranted advantage (at the expense of freedom of expression) which they confer on the plaintiff in defamation proceedings against a newspaper; the impetus to self-censorship which they generate; and the penalty in advance

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1 Dicey, ibid, p 248.

2 Dicey, ibid, p 249.

of proven guilt which they prescribe.[1] Accordingly, it is submitted that the bond requirements under Nigerian law are not 'reasonably justifiable in a democratic society' to protect 'the rights and freedoms of others': and that the legislation in question is pro tanto unconstitutional.

4.13.2 Licensing and Executive Control over Wireless Telegraphy

The constitutionality of licensing and executive control over wireless telegraphy must now be examined. It may be recalled[2] that the acquisition of a licence from the Minister is a condition precedent to the use of any apparatus for wireless telegraphy and that the Minister in general has absolute discretion both as to the grant of such a licence and as to the conditions governing its exercise. It is only in relation to broadcasting by state governments that the Minister's discretion is curtailed by the provision (described above[3]) listing three factors only which he may take into account in granting or revoking a licence to a state government, or in prescribing conditions for its exercise.[4]

The obligation to obtain a Ministerial licence to broadcast is clearly a "prior restraint" against publication, and - as such - is prima facie in violation of the right guaranteed by s 36(1) of the 1979 Constitution to 'impart ideas and information without interference'. The question

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1 All these points are, of course, more fully elaborated at p 308, et seq. As regards the latter objection, it is submitted that even the compromise suggested in Indian law (the Press (Objectionable Matter) Act 1951, cited by Holland, op cit, p 196)-that 'security should only be demanded on proof that objectionable /including libellous/ matter has been printed by the newspaper'-does not provide an acceptable solution. The effect of such a provision is still to penalise a newspaper for further libellous publication of which it has not - and may never - be guilty.

2 See p 322 above.

3 See p 325 above.

4 Ibid.

accordingly arises whether this derogation from the guaranteed right is 'reasonably justifiable in a democratic society ... for the purpose of... regulating... wireless broadcasting /and/ television', within the meaning of s 36(3).[1] It is submitted that the answer must be in the affirmative, as indicated by the United States' authorities previously considered.[2] The frequencies suitable for radio and television broadcasting are finite; and regulation in the form of prior licensing is essential to prevent chaotic overcrowding of the airwaves.[3]

It remains, however, to examine the constitutionality of the unfettered discretion vested in the Minister (in relation to private - ie., non-state - broadcasting stations) and which must inevitably give the executive wide-ranging control over such services. It may be contended that this is a point of academic interest only, given the fact that private broadcasting services in Nigeria are, at present, non-existent: all such stations being owned and operated by government, at either state or federal level. However, the 1979 Constitution recognises the possibility that a non-state entity may operate a broadcasting station (by prior authorisation of the President[4]); and it is accordingly

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1 See s 36(3)(a), Constitution of the Federal Republic of Nigeria, 1979.

2 See p 353, et seq.

3 Different considerations, of course, apply to cable broadcasting; and it is strongly arguable that the prior licensing of wired distribution services is not 'reasonably justifiable in a democratic society' and is, accordingly, unconstitutional. Cable broadcasting is likely to assume increasing importance in future years, and may ultimately necessitate a fundamental re-ordering of broadcasting law.

4 See s 36(3), 1979 Constitution, supra.

appropriate to consider the legal constraints under which such a private broadcasting station would be compelled to operate.

In the context of private broadcasting, the Minister's discretion - as previously emphasised - is absolute. This unfettered discretion (and the power of executive control it implies) *prima facie* infringes the freedom to 'impart ideas and information without interference'; and it must therefore be questioned whether it is 'reasonably justifiable in a democratic society... for the purpose of... regulating ... wireless broadcasting /and/ television'[1].

In this regard it is salutary to recall the substantially different approach to broadcasting services adopted in the United States of America. There, as previously explained, broadcasting licences are granted for fixed three-year periods by the Federal Communications Commission on the basis of criteria which are clearly stated in the Communications Act of 1934 [2] and which have been amplified by policy statements and guidelines issued by the Commission itself. Where there is competition for a licence, the Commission conducts Comparative Hearings[3]; and an aggrieved applicant who alleges that the Commission has failed to comply with the appropriate criteria may apply to the courts for redress[4]. The important factor is that the guiding

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1 See s 36(3)(a), *ibid*.

2 See Nelson & Teeter, *op cit*, p 450.

3 See Nelson & Teeter, *ibid*, p 451.

4 See, for example, the *Trinity Methodist Church, South* case, previously discussed at p 355 above.

principles are prescribed and known (and do not depend on executive whim); and that the framework, at least, is thus clear - even though broadcasting services may not always, in practice, meet the standards laid down. Moreover, the two fundamental criteria governing the grant and renewal of licences - the 'best practicable service to the public' and the 'maximum diffusion of control of the media of mass communications'[1] - are of cardinal importance and are designed to promote freedom of the media to the utmost.

Furthermore, it is important to note that considerable doubt has been expressed as to the constitutionality of an unfettered and unregulated discretion, such as has been vested in the Minister under the Nigerian Wireless Telegraphy Act of 1961. It may be recalled that the West Indies Court of Appeal, in Attorney-General and another v Antigua Times Ltd.,[2] held that the statute imposing the deposit requirement was unconstitutional for the further reason that it failed to specify 'what policy considerations'[3] the Minister should follow in exercising his discretion to accept security in lieu of cash. Lewis, C.J. (Ag.), relying upon Indian authority[4] as well as an inference from the decision

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1 See Nelson & Teeter, supra.

2 /(1973), 20 W.I.R. 573, W.I.A.S./.

3 Ibid, at 592.

4 Particularly, Dwarka Prasad v State of U.P. and others as reported in Basu's Cases on the Constitution of India, (1952-1954), in which it was held that '/a/ law... which confers arbitrary and uncontrolled power upon the executive ... cannot but be held to be unreasonable'. See judgment ibid.

(The full citation of this case is 1954 S.C.R. 803).

of the Privy Council in Francis v Chief of Police[1], emphasised the need for some objective criteria in this regard, and declared:

'even though it may be assumed that the Minister may not abuse his discretion yet where, as in this case, the object of the legislation is prima facie violative of a fundamental right, and in addition the Minister is without guidance, the possibility of an erroneous exercise of his discretion is greatly increased and in such circumstances I would hold that in so far as there is an absence of guidelines in the Act this fact renders it unconstitutional'[2].

It is submitted that this dictum is applicable with equal force to the Nigerian executive discretion under consideration.

It must, of course, be acknowledged that the Privy Council disagreed with the West Indies Court of Appeal on this issue. The Privy Council found, on the facts, that the discretion given to the Minister was not unfettered, since (in the view of the Board) the Minister was constrained by the legislation to have regard only to the sufficiency of the security tendered and could not reject an offer of security which - objectively - was sufficiently high.[3] However, it is clear that the Board's ruling (that the statute was not unconstitutional by virtue of the discretion given the Minister), turned entirely on the particular terms of the Act in issue. The decision therefore leaves open the question

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1 /1973/ A.C.761 (P.C.) Here the Privy Council held that the Chief of Police's discretion as to whether to grant permission for the use of a noisy instrument during a public meeting, was not unregulated - although no specific criteria were provided by the statute - but had to be exercised in the light of the underlying purpose of the legislation (which was to preserve public order). Lewis, C.J.(Ag.), considered that the inference from this ruling of the Board was that - in the absence of such implied regulation of his discretion - the power accorded to the Chief of Police may indeed have been unconstitutional.

2 Attorney-General v Antigua Times Ltd, supra, at 593.

3 Attorney-General v Antigua Times, Ltd., /1976/ A.C.16(P.C) at 33.

whether legislation which is not susceptible to interpretation in this way[1] should indeed be considered unconstitutional: as the lower court believed.

In principle, there is undoubtedly considerable force in the contention that the arbitrary power implicit in an unfettered and absolute executive discretion goes beyond what is 'reasonably justifiable in a democratic society'. Moreover, strong support for the contention is to be found in the United States of America, where legislation which is inherently vague or inordinately wide-ranging in ambit (measured against the purposes it is designed to achieve) is clearly regarded as unconstitutional.[2]

It is also salutary to note the practical consequences of the restrictions placed on the Minister's discretionary powers in relation to state broadcasting services. As previously explained, the Minister's discretion in granting, revoking, or imposing conditions upon, a broadcasting licence to a state government is severely circumscribed.[3] The various state broadcasting services are accordingly free from control by the Federal Ministry: and the result is a diversity of information and opinion which, although

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1 Thus, the statute may be so wide in its terms, and its purpose so general, that no equivalent limitation on the exercise of discretionary power can be implied. It is submitted, as further explained below, that the Wireless Telegraphy Act 1961 in Nigeria is precisely such a statute.

2 See Dorsen, Bender & Neuborne, eds., Political and Civil Rights in the United States, 4th ed., 1976, pp 54-55. The cases there cited in illustration of the 'void for vagueness' and 'overbreadth' doctrines are not on all fours with the type of executive discretion here in issue: but the underlying principle is equally applicable.

3 See p 325 above.

largely structured around the doctrines of the differing political parties supported by the various state governments,[1] nevertheless gives a healthy impetus to freedom of expression throughout the Federation. If the state broadcasting services were subjected to the same unfettered discretion of the Minister as applies to private broadcasters, it is difficult to feel confident that this diversity would continue. Instead, the state governments which do not support the ruling political party might find themselves constrained in order to retain their licences - to limit broadcasts criticising the central government or advocating different policies.

In summary, it is accordingly submitted that the unfettered discretion presently conferred upon the Minister is not 'reasonably justifiable in a democratic society'; and that the statute should be amended to introduce criteria and guidelines similar to those applicable in the United States of America: which are aimed at securing high standards of production, adequate coverage of matters of contemporary significance, and balanced and impartial treatment of every issue.

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[1] It will be recalled that there are 19 states in Nigeria and five recognised political parties; and that by no means all the state governments support the ruling party. Thus, for example, Borno and Gongola States support the Great Nigeria People's Party; Plateau, Anambra and Imo States support the Nigerian People's Party, and the western states the United Party of Nigeria: see The Economist, 23 January, 1982. The result, as noted by The Times (of London), in a Special Supplement on Nigeria of 3 February 1982, is that '/s/everal state governments, mainly those opposed to the present Government, are now also establishing their own T.V. stations'.

## 4.13.3. The Constitutionality of Executive Control over the Federal Radio Corporation

It will be recalled that the Federal Radio Corporation of Nigeria, established by the Act of 1979, is composed entirely of government-appointees and is also made subject to Ministerial directions which it is the duty of the Corporation to obey[1]. These controls must inevitably influence the content of broadcast programmes and accordingly cut, prima facie, across the constitutional guarantee of the right 'to impart ideas and information without interference'. This raises the question whether the controls are 'reasonably justifiable in a democratic society' for the purpose of regulating wireless broadcasting: for - if not - they are clearly unconstitutional.

The question is not altogether easy to answer. It may be recalled that the B.B.C. is subject to precisely the same 'water-tight' controls, being composed of members appointed by the Crown on the advice of the Prime Minister; and being subject to the directions of the Home Secretary, who has power to cancel its licence for failure to comply[2]. Yet the B.B.C. is widely (and justifiably) praised for its high standards of objectivity and balance. It should also be remembered, however, that the general public has little means of ascertaining the extent to which control is applied in practice (whether through self-censorship or through direct Ministerial intervention). In this regard, it is

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1 See p 326 above.

2 See p 302 above.

noteworthy that the B.B.C. has recently refused to televise The War Game, a documentary film on the destruction which would be wreaked by nuclear war.[1] It is certainly possible that this particular incident represents no more than the "tip of the iceberg" and that restriction is considerably wider-reaching than is popularly supposed.

In Nigeria itself, the way in which fraudulent election results were broadcast at the behest of the executive in the 1965 elections in the West has previously been described[2]. Such instances are no doubt extreme examples, which should be seen in the light of the particular circumstances prevailing at the time. Nevertheless, they show the danger which exists: and illustrate the fact that - so long as the law confers such executive control-it is naive to assume that it will not be exercised.

Finally, it is again salutary to recall the approach taken to the control of broadcasting services in the United States of America.[3] Here, the emphasis is placed on ensuring as wide a diversity of control as possible, in recognition of the undoubted reality that this is crucial to freedom of expression. The principle requiring 'maximum diffusion of control of the media', coupled with the 'equal time rule'[4] and the 'fairness doctrine' in its various aspects[5] - establish

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1 See the unfortunately somewhat cursory allusion to this incident in Street, op cit, p 104.

2 See p 346 above.

3 See p 353, et seq.

4 See p 357 above.

5 See p 357, et seq.

a framework which is fundamentally sound. Abuses may occur or shortcomings be exposed[1], but the important factor is that the legal principles in issue inhibit rather than facilitate this. The situation, accordingly, is very different from that which obtains when the executive is given arbitrary powers of control.

It is accordingly submitted that those features of the Federal Radio Corporation Act of Nigeria which subject the Corporation to direct control by the executive (through Ministerial direction and government-appointment of its members) are not 'reasonably justifiable in a democratic society'; and that the legislation should be amended accordingly. Appointments to the Corporation should be made by an autonomous professional body (except, of course, as regards those members appointed ex officio, such as the Ministers of Communications and of Education and Development[2]). The number of 'official' members should not, however, exceed the 'unofficials'. In addition the power of Ministerial direction should be abolished. If these changes were effected, the Corporation would then be free to uphold the important obligations placed on it under the Act to provide

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1 See, for example, the 'grandfathering' by the FCC of existing cross-ownerships of radio and broadcasting stations described by Nelson & Teeter, op cit, p 464. This special treatment was held invalid by the District of Columbia Circuit Court of Appeals in National Citizens Committee for Broadcasting v FCC, 555 F.2d 983 (D.C.Cir.1977) as the FCC had given insufficient reasons for according these stations a status different from the norm. For further details, see Nelson & Teeter, ibid, pp 464-468.

2 The list of ex officio members here suggested is not intended to be exhaustive, but simply to provide some indication of the government-appointees who should be included: always subject to the proviso that they do not, by their numbers, control the Corporation.

broadcasting services of high quality, characterised by balance and due impartiality[1]. Furthermore, to facilitate the diffusion of control of broadcasting services, the provision in the Act giving the Corporation exclusive responsibility for radio broadcasting throughout the Federation should be repealed;[2] and so too should the section limiting state radio stations to broadcasting within their own boundaries, thus giving the listener in Lagos (for example) the opportunity, if so desired, to tune in, once again, to Radio Kaduna [3].

## 4.13.4 The Constitutionality of Executive Control over the Nigerian Television Authority

Executive control over the Nigerian Television Authority takes, as previously explained, substantially the same form as that pertaining to the Federal Radio Corporation - with, however, the addition that the dissemination of news is under the control of the Director of News, who, in turn, is responsible to the government-appointed Director-General. This executive control *prima facie* violates the freedom to 'impart ideas and information without interference' guaranteed by s 36(1) of the Constitution of 1979. It remains to consider whether it is nevertheless 'reasonably justifiable in a democratic society' for the purpose of regulating television broadcasting.

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1 See p 329 above.
2 See p 332 above.
3 *Ibid*.

The issues raised by this question are substantially the same as those previously considered in relation to the Federal Radio Corporation.[1] Accordingly, it is not proposed to reiterate them here. Suffice it to state that the same policy considerations apply mutatis mutandis to television broadcasts, and that freedom of expression requires as wide a diffusion of control as possible. It follows that the provisions giving the executive control over the Authority are not 'reasonably justifiable' and should be amended in the manner suggested for the Radio Corporation. In addition, the power of control over news should be repealed.

Moreover, the provision giving the Authority exclusive responsibility for television broadcasting throughout the Federation inhibits diffusion of control; and it, too, should be regarded as 'unconstitutional'.

## 4.14. Amendment of s 36 of the Constitution to Facilitate Private Media Ownership

It will be recalled that s 36(2) of the 1979 Constitution declares the right of every person to 'own, establish and operate any medium for the dissemination of information, ideas and opinions',[2] but subjects this to the proviso that 'no person other than the Government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or

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1 See p 382 above.

2 s 36(2), Constitution of the Federal Republic of Nigeria, 1979.

wireless broadcasting station for any purpose whatsoever'[1].

As previously noted,[2] no indication is given in the section as to the criteria to be taken into account by the President in granting the requisite authority. By contrast with the position pertaining in the United States of America, where, as described above[3], the grant of a licence by the Federal Communications Commission is governed by clearly stated principles, this provision in the Nigerian Constitution gives the President an absolute discretion. Accordingly as noted in the Daily Times, in the course of the "great debate" on the guarantee of freedom of expression[4], it is most unlikely that permission will be granted 'to persons hostile to the ruling class, no matter how popular or honourable the course to be pursued by the applicant/grantee'[5]. The proviso to s 36(2) cannot, of course, be challenged on the grounds of 'unconstitutionality'; but it is submitted that it is inimical to freedom of expression, and that it should be amended by the introduction of clearly stated conditions for the grant or refusal of such Presidential authority.

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1 Ibid.

2 See p 338 above.

3 See p 356 above.

4 See the section on the Guarantee of Freedom of Expression, at p 204 above.

5 Daily Times, January 22, 1977.

It is noteworthy that the Nigerian Press Organisation (in the debate preceding the adoption of the present Constitution), stressed the need for this provision to be altered so as to limit the President's discretionary powers to the allocation of frequencies alone. In this way, the Organisation hoped that the right to private ownership of the broadcast media would be made more explicit. See Ofonagoro, W.I., et al. (eds.), The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976/77, Lagos, 1977, p 200

To recap thus, in brief, it is submitted that the present rules regarding the licensing and regulation of the media go beyond what is 'reasonably justifiable in a democratic society' in a number of key respects. Thus, at minimum, the bond requirements imposed upon newspaper publication should be amended, as should the unfettered discretion conferred upon the executive in relation to the licensing of broadcasting and the exercise by the Federal Radio Corporation of Nigeria and the Nigeria Television Authority of their important functions. Criteria for the grant of Presidential authority for the establishment of broadcasting stations should also be specified: for only if these changes are made will the law be in keeping with the constitutional guarantee of freedom of expression - and the media in Nigeria be freed from the shackles of the "prior restraint" to which it is presently made subject.

# MEDIA FREEDOM IN AN AFRICAN STATE: NIGERIAN LAW IN ITS HISTORICAL AND CONSTITUTIONAL CONTEXT

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# CHAPTER FIVE

# THE LAW OF SEDITION

## 5.1. The Significance of the Law of Sedition for Media Freedom

The significance of the law of sedition for media freedom lies principally in the fact that it constitutes a restriction on the power to criticise government. Accordingly, it touches on fundamental questions regarding the relationship between ruler and ruled, which are summarized in the following memorable passage from Stephen's History of the Criminal Law of England:

> 'Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly; that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.
>
> 'If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part.
>
> 'He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified'[1].

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[1] Sir James Fitsjames Stephen, History of the Criminal Law of England, London, 1883, 11, p 299.

Since the time (1883) when Stephens wrote, it is the latter concept which has won general acceptance - in theory, at least, if not always in practice - and government is generally regarded as being intended to serve and to promote the well-being of its people. However, if this purpose is to be achieved, it is important that the population retain the right to criticise and to censure all aspects of government, to point out inconsistent or mistaken policies, to draw attention to abuse of power; and generally to preclude the executive from obtaining the 'free hand' that may encourage it to 'commit all the natural follies of dictatorship'.[1]

The difficulty however, lies in knowing where to draw the line between criticism that is constructive and that which is aimed at riot or insurrection, or at the violent overthrow of the state, with all the bloodshed and anarchy these would entail. The law of sedition attempts to draw this line by providing, in essence, that it constitutes a criminal offence to 'bring /government/ into hatred and contempt, or /to/ excit/e/ disaffection against it'.[2] In the United Kingdom, an essential element of the offence is the intention to excite to violence[3]; but, in Nigeria, (as in other former British dependencies) it seems that this is not required, as further explained in due course.[4]

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1 See H Laski, A Grammar of Politics, 4th ed., 1955, p 126; and see also p 299 above.

2 See Denys C. Holland, 'Freedom of the Press in the Commonwealth'. (1956) 9 Current Legal Problems, pp 184-207 at p 203. The definition of sedition is discussed further below.

3 See ibid, and the discussion of the U.K. law of sedition below.

4 See p 413below: and see Holland, supra, pp 203-204.

From this brief outline alone, it is readily apparent that the law is extremely broad in its sweep. Thus, as pointed out by Dicey (in relation to the more stringently constituted English law)[1], ' the legal definition of /sedition/ might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with prevailing forms of political agitation.'[2]

From the philosophical viewpoint, the principal significance of the law of sedition for media freedom is thus two-fold. First, the law acts as a check on criticism of government which may be vital to the correction of abuses and the maintenance of democracy. Secondly, it is so broadly framed as to encompass even minor criticisms; and its criminal sanctions thus, inevitably, provide considerable impetus to self-censorship by the media.

Moreover, on a practical level, the significance of the law of sedition for freedom of the media lies in the extent to which it has, in past experience, been used by governments to stifle criticism and dissent. Thus, Mackintosh (for example) describes the sedition laws, as interpreted by the Nigerian courts[3], as having created 'a widespread feeling that any trenchant attacks on an established government might be held to be sedition'[4]. The laws are also

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1 This, of course, is by virtue of the rule that the accused must have intended to excite to violence. This requirement is not part of Nigerian law, at present.

2 A.V.Dicey, The Law of the Constitution, 10th ed. London, 1959, p 244.

3 See the discussion below, especially that relating to the Chike Obi decision, described at p 408, et seq.

4 J.P. Mackintosh, Nigerian Government and Politics, London, 1966, p 47.

considered to have been one of the factors which 'led law-makers and politicians to become "more adventurous in their violations of any remnants of... freedom of expression through the printed word"'[1]; and have been summed up by Nigerian journalists as 'very pliable and convenient instruments for the suppression of unacceptable views'[2].

## 5.2. The Law of Sedition in the United Kingdom

The law of sedition in the United Kingdom provides a useful comparative framework for examination of the Nigerian law. In England, sedition is a common law offence, which is defined in Stephen's Digest of the Criminal Law, - in terms which are substantially reflected in the Nigerian provisions - as follows:

> 'A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the Government and Constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established..., or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects'[3].

However, the Article in Stephen's Digest then further provides:

> 'An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors and defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to /effect/ their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects is not a "seditious intention".[4]

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1 /Nigerian/ Sunday Times, Editorial, 18 December, 1977.
2 Ibid.
3 Stephen's Digest of the Criminal Law, 9th ed., 1959, p 92,
4 ibid.

However, although no express reference to this is included in Stephen's definition, it is clear that, in England, 'sedition involves a further element, namely the intention to excite violence'[1] This is not altogether easy to square with the dictum of Coleridge, J., (in directing the jury) in R v Aldred)[2], warning that if a man 'makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then whatever his motives, whatever his intentions, there would be evidence on which a jury... ought to decide that he is guilty of a seditious publication'[3].

Notwithstanding this dictum, emphasis on the element of incitement to violence is clearly evident in the earlier case of R v Burns,[4] where the accused was charged with sedition for having told a large meeting of London unemployed, 'Unless we get bread, they must have lead'[5]. Despite this - and the actual occurrence of violence after his speeches - he was found not guilty of sedition because the requisite intention to excite violence was not established. Similarly, in R v Caunt,[6] the accused was acquitted of sedition even though the article he had written was strongly critical

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1 Holland, op cit, p 85.

2 (1909) 22 Cox C.C.1., reproduced by Robin Callender Smith, Press Law, London, 1978, p 86.

3 Ibid. This seems clearly to indicate that the test for sedition is objective: and that subjective intent to incite violence is not required. However, the balance of authority clearly favours the view that mens rea in such form is indeed required.

4 (1886) 16 Cox C.C. 355.

5 Ibid.

6 The Times, 18 November, 1947.

of British Jewry and ended with the words: 'Violence may be the only way to bring them to the sense of their responsibility to the country in which they live'[1] Again, the requisite element of intent to incite to violence was not shown.

These cases also illustrate another important safeguard which limits the operation - in practice - of the English law of sedition. This is the fact that all instances of alleged sedition are tried by jury: and this mode of trial is particularly important when comment or criticism of government or of highly charged issues is under review. As Denning points out in Freedom under the Law, 'even when judges are independent they may not always see clearly on a question of freedom of speech because of their own predilictions on the matter in hand'. Hence, in Denning's view, '/t/his is where the value of a jury is most clearly seen'.[2] In Nigeria, however, trial by jury 'only takes place in Lagos and only on a charge of committing /or being involved in/ an offence punishable with death'.[3] It follows that this practical limitation on the scope of sedition is not available in Nigeria[4].

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1 Ibid. The acquittal is all the more noteworthy in the light of the fact that 'anti-Jewish feeling was high /at the time/ because of atrocities committed against British troops in Palestine prior to the birth of the Israeli state': Callender Smith, supra, p 86.

2 Sir Alfred Denning, Freedom under the Law, London, 1949, p36.

3 T. Akinola Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, 3rd ed., London, 1982, para.529.

4 Although trial by jury causes considerable problems in the context of sub judice publications in the law of contempt, as further described below, it seems that it would indeed fulfill a useful function in cases where freedom of expression is in issue. The assessment of the effect of language is fundamentally subjective: and it may not be best to leave it to the determination of a single (or limited number) of judges who inevitably represent only a narrow segment of opinion.

## 5.3. The Sources of the Nigerian Law of Sedition.

The Nigerian law of sedition is to be found in the appropriate provisions[1] of the Criminal and Penal Codes, as interpreted by the courts. The Criminal Code is closely modelled on the Queensland Code,[2] which, in turn, was based upon a draft Criminal Code prepared by Sir James Fitzstephen in 1878 to replace the common law in England with all its complexities, but never in fact enacted by the British Parliament.[3] It was first introduced in Northern Nigeria in 1904; and, following the amalgamation of North and South in 1914[4], it was extended to apply throughout the country in 1916[5]. However, many of its provisions are fundamentally at odds with the Moslem Maliki law of crime[6] and hence were unacceptable to the predominantly Moslem communities of the North. In 1958, a panel of jurists[7], was appointed to examine the problem; and recommended the introduction of a Penal Code based upon the Sudanese Code (which 'had worked satisfactorily in a country in many ways similar to

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1 These are further identified below.

2 The Queensland Criminal Code was enacted in 1899 and is largely the work of Sir Samuel Griffith, as explained in further detail in R.Y. Hedges, Introduction to the Criminal Law of Nigeria, London 1962, p 4. The result is that Australian cases interpreting the Criminal Code have highly persuasive authority in Nigeria.

3 See C.O. Okonkwo (ed.), Okonkwo and Naish on Criminal Law in Nigeria, 2nd ed., London, 1980, p 5.

4 See the section on the History of Nigeria, at p 69 above.

5 See Okonkwo and Naish, supra.

6 For example, Maliki law does not recognise that provocation may reduce murder to manslaughter. For further illustrations see Okonkwo and Naish, ibid, p 6.

7 This was chaired by Sayyad Md. Abu Ranat, Chief Justice of the Sudan.

the Northern Region'[1]) and which - in turn - was based upon the Indian Penal Code, originally drafted by Lord Macauley[2]. The resulting Penal Code[3] came into force in the former Northern Region on 1 October 1960 and, from that date, the operation of the Criminal Code became confined to the sourthern areas of the country. Today, the Penal Code applies to all offences committed in the northern states[4] and the Criminal Code[5] to all which take place in

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1 Alan Gledhill, The Penal Codes of Northern Nigeria and the Sudan, London and Lagos, 1963, p 18. The author provides a comprehensive account of the adoption of the Indian Penal Code, and the manner in which a modified version of this became applicable in Northern Nigeria, at pp 15-19. The result of the Indian 'parentage' of the Penal Code is that Indian decisions interpreting its provisions are highly persuasive in Nigeria; and reference will accordingly be made to these from time to time.

2 The role played by Lord Macauley is described by Gledhill, ibid at pp 16-18.

3 The Penal Code is contained in the Schedules to the regional Penal Code Law 1959 and the Penal Code (Northern Region) Federal Provisions Act 1960. The former deals with matters within the legislative competence of the then Northern Region, and is supplemented by the latter which relates to matters of federal competence, such as treason (and also sedition).

4 These are Kwara, Niger, Sokoto, Kaduna, Kano, Bauchi, Borno, Plateau, Gongola and Benue.

5 'The Criminal Code forms the schedule to the Criminal Code Act and sets out the law of the nine Sourthern States of Nigeria in respect of the matters with which it deals' See Aguda, op cit, para. 980. Aguda further points out, in para. 990, that '/t/he Criminal Code Act... including the Criminal Code now has effect in the Lagos State as if the whole were an Act of Parliament, and in the four Eastern States, the Western and the Bendel States as if so much of it as is law made with respect to a matter included in the Exclusive Legislative List were an Act of Parliament. In the Western States the sole authentic edition of the remainder of the Act and Criminal Code is that contained in the Revised Edition of the Laws of the Western Region 1959 /which contains/ those portions of the former Ordinance and Criminal Code which the Law Reform Commission regarded as having effect as a State law, with a number of consequential amendments and with the sections of the Code numbered consecutively from 1 to 449' (which indicates that a number of provisions have been omitted). Corresponding sections in the Western States' Code (Cap 28) will be expressly identified and discussed in this study only if significantly different, as will the provisions of the Criminal Codes of Lagos State (Cap 31, Lagos Laws, 1973) and the Eastern States (Cap 30, Eastern Laws, 1963).

the south.[1] Where different elements of a crime occur in both north and south, the Code applicable in the area in which the initial act or ommission took place governs the offence, 'as if all the subsequent elements had occurred within the territory'[2]. Thus, in principle, a newspaper printed and produced in Lagos and distributed in Kano is subject to the sedition provisions of the Criminal Code; whilst a newspaper produced in Kano is governed by those contained in the Penal Code (notwithstanding its subsequent distribution in southern areas of the country). In practice - as revealed by reported cases - the provisions of the Criminal Code have more often come before the courts for judicial interpretation.

The sedition rules in the Criminal and Penal Codes are substantially similar but differ in some respects; and both are accordingly summarised below in order to point to the contrasts.

The relevant sections of the Criminal Code are ss 50 to 52. S 50 is a 'definition' provision, and defines 'seditious publication' and 'seditious intention'.[3] The latter in turn, is defined as an intention to bring the President or a State into 'hatred or contempt'[4], or 'to excite

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1 The southern states in which the Criminal Code applies are Cross River, Imo, Anambra, Rivers, Bendel, Ondo, Oyo, Ogun and Lagos.

2 Okonkwo and Naish, op cit, p 11.

3 s 50(1) Criminal Code, Cap 42.

4 This means 'not merely the absence of affection and regard but disloyalty, enmity and hostility'. See Aguda, op cit, para 1175, citing D.P.P. v Obi, /1961/1. All N.L.R. 186, discussed in further detail at p 411, et seq.

disaffection'[1] against such persons or bodies[2]. Alternatively, it means an intention 'to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established'[3]; or to 'raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria'[4]; or to 'promote feelings of ill-will and hostility between different classes[5] of the population of Nigeria'[6]. However, 'an act, speech or publication is not seditious by reason only that it intends... to show that the President or /a State/ Governor... has been misled or mistaken in any measure...; or... to point out errors or defects in the Government or constitution of Nigeria, or of any State ... with a view to the remedying of such errors or defects; or... to persuade the citizens or other inhabitants of Nigeria to attempt to procure by lawful means the alteration of any matter... as by law establihsed; or... to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will or enmity between different classes of the population of Nigeria'[7].

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1 'Disaffection' connotes enmity and hostility, estranged allegiance, disloyalty, hostility to constituted authority or to a particular form of political government': Aguda, ibid, citing D.P.P. v Obi, ibid.

2 s 50(2)(a), Criminal Code, supra.

3 s 50(2)(b), ibid.

4 s 50(2)(c), ibid.

5 Note that in Adjei and another v R, (1951) 13 W.A.C.A. 253, a decision emanating from Ghana and interpreting the virtually identical provisions of the Criminal Code there applicable, it was held that 'the Syrian community of Ghana were sufficiently well-defined as a class for an attack calculated to promote feelings of hostility against them to come within /this subsection/': Aguda, supra, para 1176.

6 s 50(2)(d), Criminal Code, supra.

7 Proviso to s 50(2), ibid.

In determining whether the intention in issue is seditious, 'every person /is/ deemed to intend the consequence which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself'[1].

S 51 defines various offences relating to sedition, and thus provides that '/a/ny person who ... does or attempts to do... any act with a seditious intention; /or/... utters any seditious words; /or/... prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; /or/ who imports[2] any seditious publication[3],... /is/ guilty of an offence'[4]. The penalties prescribed are imprisonment for two years or fine of two hundred naira or both (on first conviction); and imprisonment for three years for any subsequent offence.[5] Seditious publications are forfeited to the State[6]. Furthermore, it is also an offence for '/a/ny person... without lawful excuse /to have/ in his possession any seditious publication'[7]; and the penalties applicable are one years' imprisonment or fine of

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1 s 50(3), ibid. The practical consequence of this provision is considered further below in the course of the discussion of D.P.P. v Obi, infra.

2 'Import' is defined in s 50(1) of the Criminal Code and in s 46 of the Western States Code but the definition is omitted in the Eastern States Code: See Aguda, op cit, pa.1171.

3 This will not, however, be an offence in terms of the sub-section if the accused 'has no reason to believe that it is seditious': see s 51(d), Criminal Code, Cap 42, supra.

4 s 51(1), Criminal Code, ibid.

5 Ibid.

6 Ibid .

7 s 51(2), ibid.

one hundred naira (or both) for a first offence, and imprisonment for two years on subsequent offences[1]. Again, such seditious publications are forfeited to the state[2].

S 52 is a procedural provision and stipulates that '/n/o prosecution for an offence under s 51 /may/ be begun /more than/ six months after /its commission/'[3], that a prosecution for an offence under s 51 may not be instituted without the 'written consent of the Attorney General of the Federation or of the State concerned,'[4]; and that no person may be convicted for the offence of uttering seditious words 'on the uncorroborated testimony of one witness'[5].

The relevant provisions of the Penal Code are ss 416 to 421, (except for s 418 which prohibits the publication of false statements or rumours, as previously described[6]). Under s 416, any person who 'by words... signs... visible representation or otherwise excites or attempts to excite feelings of disaffection[7] against Her Majesty, /the President, a State Governor/ or the Government or constitution of the United Kingdom or of Nigeria or any state thereof or against the administration of justice[8] in Nigeria or any State...

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1 Ibid.

2 Ibid.

3 s 52(1), ibid.

4 s 52(2), ibid.

5 s 52(3), ibid.

6 See p 229 above.

7 In terms of Explanation 1, 'disaffection' includes disloyalty and all feelings of enmity.

8 The Penal Code is significantly different from the Criminal Code in including this provision, but is similar to the definition in Stephen's Digest, at p 392 above.

shall be punished with imprisonment for a term which may extend to seven years or with fine or with both'[1]. In 'explanations' to the section (similar to the proviso previously described) it is made clear that comments expressing disapprobation of the measures or administrative or other action of the Government... of the United Kingdom, the Federation or the Northern States with a view to obtaining their alteration by lawful means or without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under the section.[2]

S 417 further renders it an offence, punishable with imprisonment for up to three years or by fine (likewise of unspecified amount) or both, to 'seek to excite hatred or contempt against any class of persons in such a way as to endanger the public peace'[3]. The possession without lawful excuse (proof of which lies on the accused) of any books, pamphlets, papers, tape recordings, drawings, etc., the publication or exhibition of which is prohibited under the preceding provisions, is punishable by imprisonment for up to two years or fine (of unspecified amount) or both.[4] Furthermore, the Minister 'with responsibility for such matters[5], may - if he is of the opinion that this is in the public interest - 'prohibit the importation of any publication or of all publications published by or on behalf of any organisation

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1 s 416, Penal Code (Northern Region) Federal Provisions, Act No. 25 of 1960.

2 s 416, Explanation 2, and Explanation 3, ibid.

3 s 417, ibid.

4 s 419, ibid.

5 s 420(1), ibid.

or association specified in the order.[1] The intentional importation, publication, sale, distribution, reproduction or possession of any publication the importation of which has been so prohibited, is punishable by imprisonment for up to three years or fine (of unspecified amount) or both.[2]

## 5.4. Interpretation of the Sedition Provisions in the Criminal and Penal Code

In interpreting the sedition provisions of the Criminal and Penal Codes, the first important point to note is that an 'intent to excite to violence' is not pre-requisite to liability under either Code, by contrast with the position in the United Kingdom.[3] As regards the Criminal Code, the authority for this is to be found in the case of R v Wallace Johnson[4], which was approved by the Supreme Court of Nigeria in Director of Public Prosecutions v Obi[5], As regards the Penal Code, the matter has not been authoritatively determined by a local court, but Gledhill[6] points out that the Judicial Committee of the Privy Council has ruled against the need for such intent in a case under the Indian Code[7]

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1 s 420, ibid. An order of the latter kind applies to all subsequent issues and continues in force irrespective of any change in name of the organisation or association concerned. The intention that it should have retrospective effect must be expressly stated, if this is desired by the Minister.

2 s 421, ibid.

3 See the discussion of English law at p 392 above.

4 /1940/ A.C.231 (P.C.).

5 /1961/ 1 All N.L.R. 186, discussed further below.

6 Gledhill, op cit.

7 This was in Emp. v Sadashiv, A.I.R./1947/ P.C. 82.

(on which the Nigerian Penal Code is, or course, ultimately based[1]) and that 'this interpretation also has been accepted by the Supreme Court of India'[2]. The fons et origo of this interpretation may thus be said to be the Wallace Johnson decision; and the case accordingly merits careful consideration.

## 5.5. The Opinion of the Judicial Committee of the Privy Council in Wallace-Johnson

Wallace Johnson (b.1895), a Sierra Leonean, became a political activist during the 1930s and 'organised an independence movement that represented a threat to the survival of colonial rule in Sierra Leone'[3]. He also founded the Nigerian Mine Workers Union, organised the West African Youth League and its official newspaper, the African Standard, and wrote regularly for the Gold Coast Spectacular and the Africa Morning Post. He is viewed as one of the heroes of the colonial period in West Africa, and, in 1978, a statue in his honour was erected in front of the city hall in Freetown. Yet, in 1936, Wallace Johnson was charged and convicted of sedition, under section 330 of the Criminal Code of the Gold Coast Colony (identical in all important respects with the Nigerian law against sedition). The charge arose out

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1 See p 396 above.

2 Gledhill, supra, p 176, citing Romesh Thappar v State, /1950/ S.C.J.418. Indian cases are, of course, highly persuasive in Northern Nigeria.

3 Barbara Harrell-Bond: 'Freedom of the Press in Nigeria: The Debate' /1978/No. 32 Africa, American Universities Field Staff Reports, p 3.

of his publication, in a newspaper circulating in the Gold Coast, of an article which stated, in essence, that 'various laws being passed by the Gold Coast Legislative Council were mere cloaks to hide the fact that Europeans were enslaving Africans and stealing their money'[1]. The general tenor of the article is illustrated by the following extract:

> 'In the Colonies Europeans believe in the God that commands "Ye adminstrators, make Sedition Bill to keep the Africans Gagged, Make Forced Labour Bill to send the Africans into exile whenever they question your authority"'[2].

No violence resulted from publication of the article, nor was there any evidence that the accused had intended to excite such violence. He was nevertheless convicted before the Chief Justice of the Gold Coast Colony - 'the opinion of two Gold Coast assessors to the contrary being disregarded'[3]. His appeal to the West African Court of Appeal against his conviction was dismissed - and so too was his further appeal to the Judicial Committee of the Privy Council.

The proceedings before the Privy Council are particularly significant for their further impact on the law of sedition in other British dependencies. It was argued on Wallace Johnson's behalf, before the Judicial Committee, that section 330 of the Gold Coast Criminal Code was intended to reflect the English common law of sedition (as evidenced by its similarity to the definition contained in Stephen's Digest) and that, accordingly, it was meant to cover the English

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1 J.F. Scotton, 'Judicial Independence and Political Expression in East Africa - two colonial legacies', (1970) 6 East African Law Journal, pp 1-19, at p 6.

2 Denys C. Holland, 'Equality before the Law', (1955) 8 Current Legal Problems, pp 74-90, at p 87.

3 Holland, ibid.

common law in its entirety - including, therefore, the requirement[1] that the accused must have intended to excite violence by his words.

The Privy Council gave short shrift, however, to this contention. Viscount Caldecote, LC, delivering the judgment of their Lordships, emphasised that the case 'arose in the Gold Coast Colony, and that the law applicable /was/ contained in the Criminal Code of the Colony[2]' - 'not in English or Scottish cases'[3]. He went on to point out that 'The Code was no doubt designed to suit the circumstances of the people of the Colony /and that/ /t/he elaborate structure of section 330 suggest/ed/ that it was intended to contain as far as possible, a full and complete statement of the law of sedition in the Colony'[4]. It followed that the Code should be 'construed in its application to the facts of th/e/ case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland'[5].

Furthermore, the words of section 330 were clear and unambiguous and there could, accordingly, be no justification for adding 'words which /were/ not in the Code and /were/ not necessary to give a plain meaning to the section'[6]. On

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1 This requirement is, of course, reflected in R v Burns and R v Caunt, discussed above, at p 393 .

2 R v Wallace Johnson, supra, at 239.

3 Ibid, at 240.

4 Ibid.

5 Ibid.

6 Ibid.

the contrary, there was nothing in the section to 'support the view that incitement to violence /was/ a necessary ingredient of the offence of sedition'[1]. As stressed by their Lordships, '/v/iolence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result'.[2]

It followed that the task of the Judicial Committee was simply to determine whether or not the words published by the accused fell within the ambit of the definition of sedition contained within the Code. Extrinsic evidence of the accused's intentions in publishing the words in issue was accordingly irrelevant and inadmissible.

Approached in this light, the offending words were clearly seditious - and Wallace Johnson had rightly been convicted.[3]

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1 Ibid, at 241.

2 Ibid.

3 One further consideration which was, in fact, not dealt with by the Privy Council, should perhaps be canvassed at this stage. Some writers have expressed the view that reference to English authorities such as R v Burns and R v Caunt was, in any event, precluded (in the Gold Coast Colony, at least) by subsection 7(3) of its Criminal Code which states that the Colony's courts 'shall not be bound by any judicial decision or opinion from the English courts in construing /its provisions/.': See Scotton, op cit, p 8. However, as Allott points out (in Anthony Allott, Essays in African Law, London 1970, p 35), this provision only removes the binding - but not the persuasive - authority of English decisions. It does not mean, therefore, that relevant English cases are to be ignored. On the contrary, as emphasised by the courts on a number of occasions, where colonial legislation is closely modelled on English statutes, there is strong authority that guidance in their interpretation is indeed to be obtained from the English decisions.

This opinion of the Judicial Committee has had wide-ranging significance. In the words of one commentator, it 'left political expression in the British territories stripped bare of almost all protections against government suppression.. A colonial legislature - invariably[1] composed largely of Europeans and government appointees - could pass a statute tightly controlling free expression, and the judiciary would enforce it free from any common law interpretations'[2]. Without the safeguard - in particular[3] - of the requirement of an intention to incite to violence, virtually any criticism of government policies could be construed as sedition - for even the 'dispassionate pointing out of errors may well excite hatred and contempt for those responsible for them'[4]. The result is a "Catch 22" situation - in which the more grievous the error or defect, the more likely it is to arouse hatred or contempt for those responsible; and the more danger there is of being convicted of sedition for bringing the error or defect to public attention. Thus one of the most important functions of the press - to act as a watchdog against the abuse of government power - is inexorably eroded. It is accordingly most unfortunate that the Wallace Johnson decision has had such wide-ranging impact on the law of sedition in many former British dependencies - including Nigeria, as further explained in due course.[5]

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1 This seems something of an over-statement, except in the earlier years of British rule.

2 Scotton, op cit, p 9.

3 The other important safeguard is, of course, the right to jury trial, discussed at p 394 above.

4 Holland, op cit, p 87.

5 See p 413 below.

## 5.6. Interpretation of Sedition in the Criminal Code

The sedition provisions contained within the Criminal Code have come before the Nigerian courts for interpretation in a number of cases, the most important of which is the Chike Obi decision, discussed at some length in due course. Before turning to this case, however, certain earlier judgments (for the most part handed down before the adoption of the Bill of Rights in 1959[1]) warrant brief consideration.

In 1952, African Press Ltd. v R,[2] an article 'warning the public to be aware of administrative officers and alleging that they were ... disguised enemies of the struggle for freedom, mostly incompetent dictators working against nationalists'[3] was held to be seditious. In the view of the West African Court of Appeals, the article was 'clearly designed to whip up hostile feeling against Administrative Officers"'[4] and accordingly fell within the ambit of s 50 (2)(c)[5] as it was capable of 'not only of causing disaffection and discontent towards Administrative Officers by people of Nigeria but /Was/ equally capable of causing discontent and disaffection among Administrative Officers themselves.'[6]

In 1956, in R v African Press Ltd and another,[7] the accused (the publisher and printer as well as the editor) of the newspaper, the Nigerian Tribune, were charged with sedition

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1 See the section on the History of Nigeria, at p 92 above.
2 (1952) 14 W.A.C.A.57.
3 Okonkwo and Naish, op cit, pp 342-343.
4 Aguda, op cit, para 1176.
5 See p 398 above.
6 Aguda, supra.
7 /1957/ W.N.L.R.1.

following the publication of an editorial alleging that the police and Legal Department (responsible for the institution of prosecutions) were 'partial /in outlook/ to the extent of abetting lawlessness /and strife/ created by one man and his followers or /by a particular political party/'.[1] The court stressed the need for impartiality on the part of the police and Legal Department; and ruled that '/t/o suggest that they are otherwise, to impute bad motives to their actions or inactions, to accuse them of aiding and abetting lawlessness... is not only to bring them into hatred and contempt but to excite disaffection against their persons and to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants in Nigeria and the Western Region in particular'.[2] The court also emphasised that such allegations would cause people to lose faith in both police and Legal Department and to take the law into their own hands. In the court's view, there were 'lawful and effective ways of waking up /a/ department[3] (which was not doing as much as it should), but the method adopted by the accused was 'not only seditious but /was also/ an example of gross and dangerous irresponsibility which must be checked'.[4]

In 1960, in Ogidi v Commissioner for Police[5], a telegram to the Minister of Justice (copied to the Press and sent

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1 Ibid, at 4.
2 Ibid.
3 Ibid.
4 Ibid.
5 (1960) 5 F.S.C.251.

also to radio stations for broadcast), called for the replacement of the judges in certain customary courts in the Warri Division and alleged, inter alia, that they were biased in favour of the political party known as the Action Group[1]. The tenor of the telegram is illustrated by the following extract:

'Unless these courts are abolished we deem them communist institutions. Citizens not safe with customary courts still existing in Warri x Nation Co and all citizens lost confidence and West Regional Governments name and good intention Draged (sic) in mud due primitive interpretation of justice Customary Courts Warri Division'.[2]

This telegram - even though emotional to the point of incoherency - was held to be seditious.

In all three of these decisions, the courts seem to have taken an unduly narrow and harsh approach, displaying what can only be termed hyper-sensitivity to allegations which were not shown (according to the reports of the proceedings) to have had any adverse consequences in reality. It is difficult to assess the truth of the various allegations from the judgments themselves, but the suspicion must remain that they did at least contain some kernel of validity which would seem to have required further investigation in the public interest, rather than suppression under the law of sedition.

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1 It will be recalled from the section on the History of Nigeria, at p 82 above, that this was the political party which enjoyed ascendancy in the former Western Region in the initial days of independence.

2 See A.G. Karibi-Whyte, 'Seditious Publications', in T.O. Elias (ed.), Nigerian Press Law, London and Lagos, 1969, pp 67-86, at pp 76-77.

It was to have been hoped that the attainment of independence as well as the adoption of the Bill of Rights, with its guarantee of freedom of expression, would have resulted in some amelioration of the harshness of sedition rules. This hope was considerably dashed, however, by the decision of the Nigerian Supreme Court in Director of Public Prosecutions v Obi.[1]

In 1961, Dr. Chike Obi, (leader of the minority Dynamic Party) published a pamphlet entitled "The People: Facts that you must know", the salient parts of which read as follows:

> 'Down with the enemies of the people, the exploiters of the weak and oppressors of the poor!... The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians.'[2]

He was charged, before the High Court of Lagos, with sedition (under section 51(1)(c) of the Criminal Code, which renders it an offence, inter alia, to print, publish or reproduce any seditious publication). A 'seditious publication' is, in terms of section 50 of the Code, one having a 'seditious intention'; and 'seditious intention' is defined as previously outlined in brief, in section 50(2), as follows:

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1 /1961/, 1 All N.L.R. 186.

2 M.I. Jegede, 'The Supreme Court's Attitude towards some Aspects of Individual Freedom and the Right to Property', in A.B. Kasunmu (ed.), The Supreme Court of Nigeria, Ibadan, 1977, pp 107-132, at p 111.

A "Seditious intention" is an intention

(a) to bring into hatred or contempt or to excite disaffection against the person of the President or the Governor of a State, or the Government of the Federation, or of any State thereof, as by law established or against the administration of justice in Nigeria; or

(b) to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or

(c) to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or

(d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.

But an act, speech or publication is not seditious by reason only that it intends-

(i) to show that the President or the Governor of a State has been misled or mistaken in any measure in the Federation or a State, as the case may be; or

(ii) to point out errors or defects in the Government or constitution of Nigeria, or of any State thereof, as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(iii) to persuade the citizens or other inhabitants of Nigeria to attempt to procure by lawful means the alteration of any matter in Nigeria as by law established; or

(iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Nigeria.

The High Court of Lagos found the publication prima facie seditious, but - in response to the defence argument that sections 50 and 51 of the Criminal Code had been rendered void through the enactment of the constitutional guarantee of freedom of expression[1] - it referred to the Federal Supreme Court, for its determination, the following questions:

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[1] See the description of the general procedure for the protection of human rights in Nigeria at p 177, et seq.

(1) Had sections 50 and 51 been rendered void?

(2) If not, did their terms require modification in any way to fit the constitutional guarantee of freedom of expression?

The Federal Supreme Court (per Ademola, C.J.F.) answered both questions in the negative; and, in the course of so doing, made a number of important comments on the law of sedition, which may perhaps be summarised under the following heads.

(i) The meaning of 'seditious intention'.

The Federal Supreme Court appeared to assume - without any detailed consideration of this important question - that it should follow the approach of the West African Court of Appeals in R v Wallace Johnson[1] which (as previously explained) had been confirmed on appeal to the Privy Council[2]. Accordingly, in a statement with far-reaching implications for freedom of expression in Nigeria, the Court held that 'an incitement to violence is not a necessary ingredient of the offence /of sedition/'[3]. The consequences which flow from the elimination of this requirement for sedition have already been emphasised and need not be reiterated. It is accordingly most disturbing that the Nigerian Supreme Court should blindly have followed R v Wallace Johnson without considering whether it was appropriate to do so in the very different circumstances of a free and independent Nigeria.

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1 (1937) 3 W.A.C.A. 104

2 /1940/ A.C. 231 (P.C.), previously described at p 403 et seq.

3 D.P.P. v Obi, supra, at 192.

On the other hand, it should also be noted that the court emphasised that the intention in issue is one 'of exciting a state of ill feeling against the Government'[1], and that words are not seditious if they merely point out errors or defects in government with a view to their remedy. The test of 'exciting a state of ill feeling' is, of course, a nebulous one - but it does reflect some acknowledgement on the part of the court of the need to limit the meaning of 'seditious intent'.

(ii) Proof of seditious intention

The court referred to section 50(3) which provides, in essence, that the accused is to be deemed to have intended the consequences which would naturally follow from his conduct in all the surrounding circumstances.[2] The court was satisfied that this provision had been inserted simply to ease the task of the prosecution by enabling it to 'rely on the... words or the document itself without calling any extrinsic evidence'[3] The court stressed, however, that 'the subsection cannot be construed so as to deprive a person of his right to show that his only intention /was/ one of those set out in the exceptions to section 50(2)'[4].

(iii) Truth as a defence to a charge of sedition

It is clear that the Supreme Court did not reject the relevance of truth as a defence in general. It did, however, point

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1 Ibid, at 192.

2 See p 399 above.

3 Ibid, at 195.

4 Ibid.

out that truth could not be a defence 'where the seditious intention was clear and patent'[1]- a statement which raises a host of unanswered questions. On the other hand, it also qualified this by explaining that truth 'may... in certain circumstances, be a relevant consideration for the purpose of ascertaining... the real intention of the person charged.'[2]

(iv) Whether the laws against sedition are indeed 'reasonably justifiable'.

Defence counsel had contended that the sedition laws were not reasonably justifiable[3] because (1) they exposed individuals to prosecution irrespective of the truth of their criticisms of government; and (2) did so irrespective of the actual repercussions on public order[4]; whilst, (3), a law could only be 'reasonably justifiable' in the interests of public order if the conduct it sought to prohibit would invariably - in every case[5] - result in public disruption.[6]

The Supreme Court disagreed for the following reasons.

(1) Truth is not irrelevant - except where the seditious intention is 'clear and patent', as discussed above.

(2) Incitement to violence is not an ingredient of the offence, following R v Wallace Johnson.

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1 Ibid.

2 Ibid.

3 It will be recalled from the general discussion of the guarantee of freedom of expression at p201 above, that the constitution permits derogation inter alia, through laws that are 'reasonably justifiable in a democratic society' in the interests of public safety and public order.

4 DPP v Obi, supra, at 191.

5 Ibid, at 196.

6 Ibid .

(3) Society is entitled to take reasonable precautions to prevent public disorder from arising and this may legitimately 'involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly'[1].

The Court then proceeded to describe the limits of the individual's freedom to criticise the government in the following terms:

> '/A/ person has a right to discuss any grievance or criticise, canvass or censure the act of Government and their public policy. He may even do this with a view to affecting a change in the party in power or to call attention to the weakness of Government, so long as he keeps within the limits of fair criticism. It is clearly legitimate and constitutional by means of fair argument to criticise the government of the day. What is not permitted is to criticise the Government in a malignant manner... for such attacks, by their nature, tend to affect the public peace'[2].

Accordingly, the Court concluded that:

> '/T/he exceptions to section 50(2) of the Criminal Code... form enough protection to a charge of sedition and they offer enough freedom of expression to anybody in our democratic society. The section does not... prevent fair criticism of the Government and only prohibits publications made with the intention of exciting hatred and contempt, or disaffection against, inter alia, the Government'[3].

One further aspect of the judgment which merits careful consideration is the statement by Brett, F.J., in his separate concurring judgment, that the courts - whilst remaining alive to their responsibility to rule on the constitutionality of legislation allegedly inconsistent with the fundamental rights' provisions - should nevertheless 'remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not

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1 Ibid.

2 Ibid, at 194.

3 Ibid, at 196.

to impose their own views of what the law should be.'[1] He further elucidated this point by citing, inter alia[2], the judgment of the Indian Supreme Court in State of Madras v Row[3], to the effect that judges, in exercising the function of constitutional review, should be guided by -

'their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable'[4].

Brett, F.J. accordingly stressed the fact that section 416 of the Penal Code of the Northrn Region (similar in all important respects to sections 50 and 51 of the Criminal Code) had been adopted in 1960 by the elected representatives of the people and 'at a time when a guarantee of freedom of expression identical to that contained in section 24[5] was already in force'[6]. Accordingly, the Court was not dealing merely with 'part of the legacy of a former /colonial/ regime'[7]. The inference is plain that Brett, F.J. considered this a factor of considerable significance in reaching his concurring decision that the law against sedition remained fully in force.

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1 Ibid, at 197.

2 The further authority cited by Brett, F.J., is considered below at p 420.

3 (1952) S.C.R. 597.

4 DPP v Obi, supra.

5 This is the section containing the guarantee of freedom of expression in the Independence Constitution of 1960. It is identical to section 25 of the 1963 Constitution, in issue in these proceedings and substantially similar to the present guarantee in s 36 (read with s 41) of the 1979 Constitution.

6 DPP v Obi, supra at 198

7 Ibid.

Overall assessment of the judgment is not altogether easy. The judgment delivered by Ademola, C.J.F. suggests to some extent that the Court was inclined to favour a restrictive interpretation of the statutory provision - so as to uphold the interests of individual liberty. Unfortunately, however, many of the key aspects of the judgment are so vague as to provide almost no guidance in concrete cases at all. For instance, what constitutes an intention to 'excite a state of ill-feeling against the Government'?[1] When is a seditious intention so 'clear and patent'[2] as to exclude the relevance of truth as a defence? What is the ambit of 'fair'[3] criticism?

It is unfortunate that the Supreme Court was not called upon, in the circumstances[4], to decide whether or not Dr. Obi had in fact been guilty of sedition. Such enquiry would have helped to throw some light at least on how the Court envisaged these tests being applied in practice. However, the Court knew, of course, that the High Court of Lagos had already found the charge against Dr. Obi proved on the facts; and the Supreme Court's failure to comment on this may therefore perhaps be taken as tacit approval of the decision.

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1 Ibid, at 192 and see discussion at p 414 above.

2 Ibid, at 193 and see discussion at p 415 above.

3 Ibid, at 196 and see also p 416 above.

4 The Supreme Court had merely been asked to rule upon the continuing efficacy of sections 50 and 51, as discussed at p 412-413, above.

Be that as it may, the final outcome of the case was undoubtedly most unfortunate for freedom of expression in Nigeria. It would seem, as Nwabueze[1] states, that Dr. Obi was doing no more than attempting to 'induce the people not to vote for /the Governemnt/ at the next election'[2]. If this is held to constitute sedition, then the scope to offer 'fair criticism' of Government is minimal - if it exists at all.

The most disturbing aspect of the judgment itself lies perhaps in Brett, F.J. s, call for judicial self-restraint in determining the constitutionality of legislation. The constitutional guarantees were inserted in recognition of minority fears[3] that the legislature and executive (reflecting the will of the majority) could not always be relied upon to safeguard the minority interests. Accordingly, it was considered essential that the judicial branch of government should be enjoined - and entrusted - with the task of ensuring that legislative or executive action did not infringe the rights of individuals. The doctrine of constitutionality[4] undermines this protective scheme - especially when it is applied to laws which prima facie contravene the fundamental guarantees. It is therefore most disturbing to note not only Brett, F.J.'s support for the doctrine, but also his distortion of the

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1 B.O. Nwabueze, Constitutionalism in the Emergent States, London, 1973.

2 Ibid, p 151.

3 See the section on the History of Nigeria and the report of the "Willink" Commission, at pages 91 and 171 above.

4 The doctrine of constitutionality in Nigerian law has, of course, previously been discussed at p 191 above.

United States' case which he cites, inter alia[1], as authority for adopting it. This is the Supreme Court decision of Missouri, Kansas and Texas Railroad v May[2]; and from it, Brett, F.J. quotes the following dictum of Holmes, J.:

'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts'[3].

It is clear, however, from the judgment as a whole that Holmes, J., far from upholding the doctrine of constitutionality, was emphasising that the legislature and judiciary have equal responsibility in ensuring that the rights of the citizen are not eroded. Holmes, J. 'did not suggest that when there is an alleged conflict between the guaranteed rights and a Congressional Act, the Court should presume the constitutionality of the latter, thus imposing the burden of rebutting such a presumption on the citizen for whose benefit the rights were incorporated in the Constitution.'[4]

The Federal Supreme Court decision in DPP v Obi has been criticised by a number of commentators. Thus, for example, Jegede states:

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1 The other authority relied on by Brett, F.J., (ie. the Indian Supreme Court case) has already been discussed at p 417 above.

2 194 U.S. 267 (1904).

3 Cited by Brett, F.J. at 197 of the Chike Obi judgment.

4 M.I. Jegede, 'The Supreme Court's attitude towards some aspects of individual freedom and the right to property' in A.B. Kasunmu (ed.): The Supreme Court of Nigeria, Ibadan, 1977, pp 107-132, at p 116. For an interesting discussion of the U.S. approach to freedom of expression and sedition see Dr. Hari Chand: Fundamental Rights in Nigeria, Jos, 1980, pp 44-45, in which the author traces the vicissitudes suffered by the 'clear and present danger' approach before the U.S. Supreme Court; and see also the discussion at p 441 below.

'It is... regrettable that the Supreme Court was more concerned with the exception clause than with the substantive section of the guaranteed rights; otherwise (sic) the ambit of this section ought to have been amplified with a view to making it easier for a citizen to know the scope and extent of his guaranteed rights, particularly when the Supreme Court has sustained the validity of a sedition law whose validity is beyond reasonable comprehension'[1]

Nwabueze expresses his surprise that a law 'specially designed to strengthen the hands of the colonial administration' should 'continue to be applied in the same rigorous manner' in an independent Nigeria 'under a constitution that guaranteed freedom of speech'[2]

Grove queries the correctness of the Supreme Court's approach, pointing out that:

'The Constitution appears to guarantee absolute freedom of expression unless it can be shown that some pressing public interest demands recognition. /Accordingly/, the proper focus is not on whether or not the residue of permissible expression left over is sufficient, but whether the restriction is of /such/ pressing character in the first place'[3]

The Chike Obi decision has clearly had disquieting consequences for freedom of expression in Nigeria. This is particularly evident in African Press Limited and another v Attorney-General, Western Nigeria,[4] in which the Supreme Court was again given the opportunity to rule upon the ambit of sedition. The case arose out of the publication, in a newspaper called the Nigerian Tribune[5] of an article

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1 Jegede, supra, p.115.

2 Nwabueze, Constitutionalism and the Emergent States, supra, p 397.

3 D.L. Grove, 'The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights', (1963) 7 Journal of African Law, pp 152 - 171, at p 170.

4 /1965/ 1 All N.L.R. 12.

5 On 16 April 1964.

describing the charges which had been levelled against the Western Region Government on a vote of no confidence initiated by the Opposition in the Western House of Assembly. The newspaper undertook to review these charges as well as to 'direc/t/ the attention of the nation to other ugly spots which the Opposition did not mention'[1]. The publisher and editor of the newspaper were charged and convicted (by the High Court) of 'sedition', under sections 46 and 47 of the Western Criminal Code[2], equivalent to sections 50 and 51 described above. They appealed to the Supreme Court.

In the view of the Court (per Brett, J.S.C.), the article - which began by stating that the Opposition had "neatly marshalled a catalogue of reckless squandermania and abuse of office against the government"[3] and then proceeded to review these charges and offer its own comments - was 'by any standard a robust piece of invective'[4]. Even though describing its language as 'abusive throughout', the Court also acknowledged that

> '... if the right to freedom of expression is to be given its full effect the court must be satisfied that /the article/ went beyond the bounds of what is permissible in political controversy, and that the intention could fairly be called seditious'[5].

Whilst this approach augurs well for the right of free speech, it is belied by the Court's subsequent analysis. The Court went on to state:

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1 African Press Ltd. v A.G. Western Nigeria, supra.

2 Criminal Code, (Western States), Cap 28. See p 396 above.

3 African Press Ltd. v A.G. Western Nigeria, supra at 14.

4 Ibid.

5 Ibid.

'The article was prima facie seditious and if the appellants maintained that their only intention was one of those set out in the exceptions it was for them to satisfy the court on the balance of probabilities that this was so'.[1]

In attempting to discharge this onus, truth would not be an irrelevant consideration - except where the seditious intention was clear, as held in DPP v Obi.[2]

The Court then went on to consider some of the charges levelled against the government in the article. The first was that the government had wasted an enormous sum (£250,000) on the lease of a house at Ikeja - a charge which was entirely false and misleading and which 'illustrate/d/ how deep the appellants' regard for the truth was'.[3]

In addition, the article contained various allegations of Government "squandermania", "abuse of office", "misuse of money held in trust for the people", and "fraudulent diversion of public money for private purpose"[4]. To substantiate the truth of these charges, the appellants had called (at their trial before the High Court) for the production of some 400 files of the Ministry of Trade but this had been refused on the ground that the Minister had certified (under section 219 of the Evidence Act) that he was satisfied that their production would be contrary to the public interest. The appellants argued before the Supreme Court that this refusal had prejudiced their defence and that their convictions should accordingly be set aside. The Supreme Court's

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1 Ibid, at 15.

2 Ibid, at 14-15; and see also the discussion of the relevance of truth as a defence at p 414 above.

3 Ibid, at 15.

4 Ibid, at 16.

response to this is interesting and merits some consideration.

The Court acknowledged that it was bound to 'accept the production of such a /Ministerial/ certificate as conclusive' but emphasised that

> 'It remains the duty of the Court to uphold the right to a fair trial, and if in a criminal case there are reasonable grounds for supposing that the exclusion of evidence by such a certificate might have prejudiced the accused in making his defence, the court is bound to say that the prosecution has not proved its case beyond reasonable doubt'[1].

Ministers 'should be reminded that it is always contrary to one facet of public interest if relevant evidence is excluded /and/ /t/he relevance of evidence is /a question/ for the court, not the Minister, to decide'[2]. Accordingly, the Supreme Court recommended that Ministers should in future adopt the "middle course" provided for by section 22(3)(b) of the Constitution of the Federation and submit "sensitive" material to the court for scrutiny in camera - rather than exclude it altogether.[3] As regards this particular instance, however, the Court agreed 'with the Director of Public Prosecutions that /the application for some 400 files/ was a mere "fishing" application'; and pointed out that

> 'a defendant whose own evidence shows that his charges were based on mere suspicion, or on an uncritical acceptance of allegations made by others, can /not/ demand a disclosure of everything that passes within a government office in the hope that he may find something that would justify his charges.'[4]

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1 Ibid.

2 Ibid, at 17.

3 Ibid, at 16. The reference here is, of course, to the 1963 Consitution of the Federation, Act no 20 of 1963. The equivalent provision is today contained in s 33(4) of the Constitution of the Federal Republic of Nigeria, 1979.

3 Ibid, at 17.

Hence, the Court was satisfied that no prejudice to the appellants had resulted from this refusal.

A further allegation contained in the article was that the Government was secretly funding a newspaper called the Daily Sketch and attempting to pass it off as an independent publication. Defence counsel's attempts to obtain sight of further Government files regarding this newspaper had been precluded at the trial by a similar Ministerial certificate that production would be contrary to the public interest. In this instance, the Supreme Court believed that 'something helpful to the appellants /may indeed have been/ excluded by the claim of privilege'[1]. Accordingly,

> '... so far as the conviction rested on the finding that the passages dealing with that matter were proof of a seditious intention /the Court was/ not prepared to uphold it'[2].

Notwithstanding the above, the Court was satisfied - 'consider /ing/ the wording of the article as a whole and the evidence about how it came to be written'[3] - that the article was indeed seditious. It found support for this conclusion in one particular passage which could in no way have been affected by the claim of privilege. The passage began with a quotation from a speech made by one of the Ministers in the no confidence debate to the effect that "The government had aroused awareness among the Yorubas". The article then proceeded:

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1 Ibid, at 18.
2 Ibid.
3 Ibid.

'"We are shuddered (sic) to understand what the government meant by this. In other words, the government had succeeded in inciting the people it governs to rise against other ethnic groups in the federation. Perhaps this point will impress the federal government to think of a law which will prevent some unscrupulous tribal politicians who are out to upset the existence of the federation. The incitement of any tribe against another tribe must be made treasonable offence"'.[1]

The Supreme Court's response to this passage is both astonishing and profoundly disturbing. It reads as follows:

'No reasonable tribunal could hold a perverse and unfounded accusation of this kind, when made against the government of a Region, to be anything but seditious'[2].

Even allowing for the dangerous divisiveness of inter-ethnic conflict in Nigeria, this judgment seems unnecessarily harsh and leaves little scope for the exercise of the right to free expression.

A further example of what constitutes 'sedition' arose from the establishment in 1962 of a commission of enquiry (the Coker Commission) to investiagte the activities of a number of corporations controlled by the Action Group. '/I/t's report was criticised as a "huge document of legal inconsistencies"'[3]. For this, the critics, Dr. Olu Odumuso and others, including the editors of the Daily Express, were convicted of sedition.[4]

More recently, in August 1981, the editor and editor-in-chief of the Nigerian Tribune were arrested (and held in

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1 Ibid.

2 Ibid.

3 B. Harrell-Bond, op cit, p 4.

4 Ibid.

police custody for 36 hours[1]) and then charged with sedition for having published a front-page story in the issue of 28 July 'in which President Shagari was alleged to have bribed opposition federal legislators so as to ensure support for his Bills in the National Assembly'[2]. An application for the charges against them to be quashed was set down for hearing on 15 September and, if this failed, trial was scheduled for early November[3]. Unfortunately, however, no report of the outcome of the proceedings is yet to hand.[4]

## 5.7. Interpretation of Sedition Under the Penal Code

As regards the interpretation of the 'sedition'[5] provisions of the Penal Code, there are unfortunately no reported Nigerian decisions; and reliance must accordingly be placed on Indian cases, interpreting equivalent provisions of the Indian Code, which have strong persuasive authority[6].

The first point to note is that, following the Privy Council ruling in R v Wallace Johnson, discussed above, 'it is not necessary to prove that the words used were likely to lead to violence'[7]; nor is it necessary 'to produce evidence of intention outside the words /themselves/'[8]. Regard must,

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1 Their offices were also sealed off and searched by more than 100 armed police. See /1981/ 6 Index on Censorship, Notes.
2 Ibid.
3 Ibid.
4 Law reporting in Nigeria is still somewhat haphazard, though the introduction of new series such as the Criminal Law Reports and Constitutional Law Reports of Nigeria are helping greatly to correct earlier deficiencies. In addition, there is some delay in reports from Nigeria being received in London.
5 Note that the word 'sedition' does not appear in the section itself or in the marginal notes, but only in the Chapter heading.
6 See p 406 above.
7 Gledhill, op cit, p 176.
8 Ibid.

however, be had to the surrounding circumstances and '/t/hings may /accordingly/ be said in a medical or legal textbook which would be punishable if published in a partisan newspaper at a time of tension'[1]. Furthermore, an article must be read as a whole, and 'if a man speaks with two voices, he cannot claim the innocuous one as his own'[2] and repudiate the remainder. Disaffection may be promoted by innuendo - in which case, however, the prosecution must prove the guilty meaning alleged. Further, Gledhill points out, '/d/isaffection may /also/ be promoted by statements which are true as well as by false statements'[3]; and it is accordingly most disturbing that the Penal Code makes no express provision for truth to operate as a defence. In this regard, it is worth recalling that sedition in common law is a species of criminal libel; and that the common law regarded truth in this context as an aggravating factor, thus giving rise to the aphorism, further described below, that "the greater the truth, the greater the libel".[4] Again, this would seem to place an accused in the uncomfortable "Catch 22" situation previously described in relation to the sedition rules of the Criminal Code.[5]

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1 Ibid. A good illustration of this is provided by the Indian Case of Joy Chandra v Emp., (1910) I.L.R. 38 Cal 214, in which an article purporting to describe proceedings at a forthcoming religious festival was held to be seditious because national feeling was running high at the time, and two British officials had been assassinated a week before.

2 Gledhill, supra.

3 Ibid.

4 See the discussion of the criminal law of defamation at p 592 and 622, et seq.

5 See p 407 above.

Examples of speeches or publications held 'seditious'[1] in India include the following:

(i) a speech addressed to a large audience of labourers at a time of political unrest and economic hardship, alleging that Government was 'absolutely callous as to what happened to the people' and had deliberately refused to co-operate with political leaders to alleviate the situation;[2]

(ii) a speech to the Peasants' Union, urging the abolition of landlords, moneylenders and Government and emphasising that the first step was to get rid of Government;[3]

(iii) the allegation that Government has 'deliberately set community against community'[4] and

(iv) the assertion that 'Government in the name of law and order is showering bullets on the people'[5].

By contrast, criticism of the salaries paid to high officials as compared to ordinary men,[6] exhortation not to pay taxes or join the armed forces[7], and the call for a boycott of British goods[8] have been held not to fall within the provision.

It seems that if 'rioting or other forms of violent agitation directed against Government... /has/ followed a speech or publication, that /is/ strong evidence of intention to create disaffection'[9]. In addition, in determining an

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1 The word is used for convenience, even though it does not appear in the enactment, as previously explained.

2 Punnoose, /1948/ M.W.N. (Sup) 35.

3 Narayan v Imp. A.I.R. /1940/ Bom. 379.

4 Om Parkash, 42 P.L.R. 382.

5 Maniben v Emp., A.I.R. /1933/ Bom. 65.

6 Om Parkash, supra.

7 Ibid.

8 Jagan v Emp. A.I.R. /1932/ Lah. 7.

9 Gledhill, op cit, p 178.

accused's intentions, regard may be had to his writings or utterances on other occasions.[1]

As regards the ambit of s 416, it is noteworthy that it is considerably wider than its counterpart in the Indian Code, in that it extends to the excitement of disaffection - not only against government in Nigeria - but also against Her Majesty or the Government of the United Kingdom. The Indian case of Lachhman Singh v Emp.,[2] illustrates the practical significance of this. Here, an Indian newspaper, 'published an article alleging that the English had... /attempted/ to capture Afghanistan by duplicity, making the Afghan King introduce Western fashions on the one hand and inciting his subjects to rebellion on the other'[3]. The writer was acquitted as his attack was directed against the Government of the United Kingdom, which is not covered by the Indian section. As Gledhill points out, however, '/i/n Northern Nigeria he would /have/ come within the section'.[4]

The Nigerian provision is also wider than the Indian one in including within its scope the excitement of disaffection against both the Constitution and the administration of

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1 See ibid.
2 A.I.R. /1930/ Lah. 156.
3 Gledhill, op cit, p 179.
4 Ibid.

justice[1].

Criticism of an individual, or of a limited section of a particular public service (such as a few police officers in a given town) would generally not be considered as exciting hatred against Government , as these people could not be said to represent the 'abstract conception' of Government[2]. An attack on a Minister (under a system of responsible Government) may, however, do so.[3]

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1 Hence, '/p/ublishing allegations that the courts did not hold the balance fairly in cases to which Government was a party or that the authority responsible for the selection of appointees to judicial office was guilty of nepotism or partiality would be within the section', Gledhill, ibid p 181. Under the common law, such allegations would be counted as 'scandalising the court' and hence as a species of contempt. This provision of the Penal Code is accordingly an important part of the Nigerian law of 'scandalising the court' and will be further referred to in the appropriate section of this study at p 901 below.

2 See Gledhill, ibid, p 179.

3 See Kidar Nath v Crown, A.I.R. /1949/ E.P. 289. Here the accused wrote a newspaper article accusing Ministers of the East Punjab of being dilatory in dealing with the problem of refugees from Pakistan; and charged them with having brought 'dishonour on /the Congress Party/ by succumbing to partisanship and selfishness': See Gledhill, ibid, p 180. Interestingly, the court held that the attack on the Ministers amounted to an attack on Government - so as to bring the accused prima facie within the section - but that the article 'would be less likely to arouse contempt of Government in the mind of the intelligent reader than amused contempt for /the accused himself/', and hence was not seditious. See Gledhill, ibid.

As regards the explanations to the section, the 'Judicial Committee has said that the/in/ object... is not to modify the first part of the section by implying that a malicious intention is an essential ingredient of the offence but to protect the honest agitator whose intention is to secure redress of wrongs and not a mere mischief maker'[1]. It seems thus that '/a/ man may comment upon any measure or act of Government... and freely express his opinion upon it, severely, unreasonably, perversely or unfairly, but if he goes beyond that and holds up Government to contempt, for instance by attributing to it every evil or misfortune suffered by the people or by imputing to it base motives or indifference to the people, he is within the section and the explanations will not save him'.[2] Likewise, he may disapprove or attack Government measures, 'using strong language if necessary'[3], but he may not 'attribute dishonest or immoral motives'[4] to Government, and his language must not be such 'as is likely to arouse feelings of enmity, hatred or disloyalty'[5]. These dicta underline the difficulty of drawing the line between what is legitimate, and what unlawful. They also indicate that attempt to do so is intrinsically arbitrary, for - as Gledhill points - 'no two persons will draw the line in precisely the same place'[6]. Again, this underscores the value of trial by

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1 Gledhill, ibid, p 182, citing Annie Besant v Advocate-General, (1919) L.R. 46 I.A. 176.

2 Gledhill, op cit, p 182.

3 Ibid.

4 Ibid.

5 Ibid.

6 Ibid.

jury in cases of sedition[1] as a means of restricting in some measure - the practical ambit of the offence.

As regards s 417, which makes it a crime to 'seek to excite hatred or contempt against any class of persons in such a way as to endanger the public peace'[2], it is clear that 'to seek to incite' is to attempt to incite and that, according to Indian authority, intention to incite is therefore an essential ingredient of liability[3]. Evidence of intention may, however, be gleaned from the surrounding circumstances: including factors such as the type of audience addressed and 'the state of public tranquility' at the time.[4] A 'class" must be 'well defined and readily ascertainable /and must/ have some element of permanence and stability'[5]. It thus includes a religious denomination or the police, but not 'landlords, moneylenders and capitalists'[6]. It must be shown that the accused 'acted in such a way as to endanger the public peace'[7]; but the actual occurance of violence or other disturbance is not a pre-requisite, though it would clearly provide strong evidence that the accused had acted in such manner.[8]

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1 It will be recalled that trial by jury applies in England and its efficacy in limiting the instances in which an accused is found guilty of sedition is revealed both by the cases discussed above and by the fact that prosecution for sedition in England has (largely as a result of these cases and the difficulty of securing conviction) become extremely rare.

2 See p 401 above.

3 See Gledhill, supra, pp 184 and 176.

4 See Gledhill, ibid, p 184.

5 Ibid.

6 Ibid.

7 Ibid, p 185.

8 Ibid.

As for s 419, which prohibits the possession of seditious articles,[1] the onus lies on the prosecution to prove both possession and the fact that, if the article were published or exhibited, this would amount to an offence under the sections previously examined.[2] The burden then shifts to the accused 'to establish, if he can, lawful excuse for possession, such as that he was keeping it for another and had no reason to believe that the article was of such a nature as to come within the scope of the section... or that he was engaged in research and had no intention of exhibiting the article to any other person'[3].

Finally, as regards s 420, which empowers the Minister - if in his opinion it is in the public interest to do so - to prohibit the importation of a specified publication or of all publications produced by a particular organisation,[4] the prosecution is under no duty to prove that the publication is objectionable or that its importation would be contrary to the public interest. The Minister's discretion in this regard is absolute, and all that is required for conviction is that the particular publication should be covered by the order made.[5] Publication, sale, distribution

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1 See p 401 above.

2 Note that s 420 also refers to articles which fall within the ambit of s 418, which has not been described above because it relates to the publication of false news, discussed elsewhere in this study - in the chapter which provides an overview of media freedom in Nigeria at p 229 above.

3 Gledhill, op cit, p 187.

4 See p 401 above.

5 This may raise some difficulty where the order is directed not against a particular, specified publication only, but against all publications of a given organisation.

and reproduction of such articles is also prohibited, and it seems that the only intention on the part of the accused necessary for liability is the narrow intent to do the particular act prohibited. Hence '/i/t could not be a defence that the accused was unaware of the Minister's order'[1]

## 5.8. An Additional Disturbing Precedent under a Related Law

An additional disturbing precedent - under Regulations closely analogous to the law of sedition - is provided by the case of R v Amalgamated Press of Nigeria Ltd and another.[2] It must be acknowledged at the outset that this case was decided during a period of some unrest[3] and under regulations promulgated pursuant to emergency powers; and that it would hopefully not therefore be followed in a period of normal rule. Nevertheless, it serves to illustrate once more the kind of political criticism which may be penalised under sedition laws; and therefore merits brief consideration.

The accused were the proprietors and editor of the Daily Express and were charged with contravening s 2 of the Emergency Powers (Misleading Reports) (Amendment) Regulations, 1962[4] which prohibits the publication in a newspaper of any matter which is 'likely... to expose... the government...

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1 Gledhill, supra, p 188.

2 /1962/ W.N.L.R. 272.

3 It will, however, be recalled from the section on the History of Nigeria that some commentators believe that the 'emergency' was largely fabricated by the central government in order to break the power of the Action Group in the West. See p 94 above.

4 L.N. 107 of 1962.

of... a Region... to hatred, ridicule or contempt'[1]. The charge arose out of the publication of an editorial in the newspaper's issue of 17 September, 1962, which was headed "Scrap them Moses"[2]; and which called, inter alia, for the Administrator of the Western Region (then ruling the area under emergency powers[3]) to stop wasting public funds on the publication of two newspapers which (it was alleged) were being used by him for 'propaganda purposes to boost the prestige of the Emergency Administration and in particular of the Administrator himself'[4]. The article is worth quoting in full for a proper appreciation of its tenor. Having commenced with the heading described above, it proceeded:

'Keep abreast with Western Nigeria. Read Western News and Irohin Itesiwaju says an advertisement by the Ministry of Information of the Emergency Administration of Western Nigeria in a local newspaper.

Irohin Itesiwaju means "Progress Report". And coming from Western Nigeria one might ask what pride is in a state of emergency to shout its own praises on rooftops. Has the declaration of a state of emergency not stained the good name of Nigeriaat home and abroad to make the whole episode a sad commentary on the nation's self-respect and international reputation?

No, not on your life. Why on earth has the Emergency Administration embarked on this crazy adventure...

Now, the Western News is back. This time "FREE". You don't have to pay for it now. It is a gift from the Emergency Administration of Dr. Moses Majekodunmi. The two publications are the 1962 Manna from Moses of 1962 to the people of Western Nigeria wandering through the wilderness of emergency rule.

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1 s 2(b), ibid, the full text of the relevant regulations is set out in the judgment, supra, at 273.

2 See Amalgamated Press of Nigeria Ltd, supra at 273.

3 See the section on the History of Nigeria at p 94 above. It is ironic to note that consent of either the Attorney-General, Director of Public Prosecutions or the Administrator was required for the commencement of proceedings under the Regulations; and that it was the Administrator himself who gave the requisite consent. See judgment, at 273.

4 R v Amalgamated Press of Nigeria Ltd., supra at 275.

Only Dr. Majekodunmi knows what he hopes to achieve by this new drain on the coffers of Western Nigeria. But the Daily Express thinks the whole adventure is misguided and ought to be scrapped forthwith.

First, Dr. Majekodunmi tells us that Western Nigeria is broke. It is paying the salaries of clerks and messengers from loans and overdrafts. That is certainly a tale of woe.

But is there any sign of austerity which should follow such discovery? We have not seen it yet. All we find is a stubborn policy of waste and extravagance.

The latest of course is to run these two publications and the papers like similar propaganda sheets to be distributed free.

We have said it before that some people are giving the impression that the present state of emergency in the West is not a temporary one.

Maybe when Dr. Majekodunmi looks into the mirror at Government house, Ibadan, he sees himself as the next Premier of the Western Region. That, certainly, is not a bad dream. As a Nigerian, he is entitled to aspire to that high office. And more too.

But the way to go about becoming the next Premier of the West is first to find himself a constituency. And he won't find one in the goodwill of Sir Abubakar.

The Emergency Administration cannot become a political party. If these two publications are designed to boost the prestige of that administration its effect is bound to be temporary.

So, why not call off the gamble now, Dear Moses'.[1]

In assessing the effect of the article, the court stressed the similarity between the Regulations and the law of sedition, but pointed out that the former - unlike the latter - penalises the exposure of government to ridicule, as well as to hatred and contempt.[2] In the court's view, the article 'taken as a whole /was/ one that /was/ likely to expose the Administrator if not to hatred, clearly to the ridicule

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[1] Ibid, at 275-276.

[2] Ibid, at 274.

and contempt of persons in Nigeria and especially /in the Western Region/'[1]. This was particularly apparent in the heading ("Scrap them Moses") and in the concluding sentence ("So why not call the gamble off now, Dear Moses").[2] All in all, in the opinion of the court, the article /went/ far beyond the bounds of fair, decent and honest criticism'.[3] The court also pointed out that the offence charged under the Regulations 'does not give an accused person the various safeguards and defences as are provided in the case of publication of a defamatory matter or libel (sic)'[4]; and further stressed that 'the real test in the case /was/ not the falsity or otherwise of the article but whether the publication /was/ likely to expose the Administrator in his capacity as a member of the government of Western Nigeria to hatred, ridicule or contempt'[5].

Taking all these factors into account, the court was satisfied that the publication indeed contravened the Regulation. It accordingly found the newspaper proprietor guilty[6]; but acquitted the paper's editor, on the basis that he had been away from his office in Lagos at the time of publication (having been attending a court case in Ilorin for the previous eight days) and was accordingly 'in no way a party to the

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1 Ibid, at 275.

2 Ibid, at 275 and 276.

3 Ibid, at 276.

4 Ibid, at 274.

5 Ibid, at 275.

6 Ibid, at 278. Unfortunately, no indication is given in the report of the penalty meted out to the company.

publication of the article.'[1]

In assessing the judgment, one aspect of the court's decision is clearly to be welcomed: viz, the acquittal of the paper's editor. This indicates that the intent to publish an article which is found to offend is - at minimum - a pre-requisite to liability.[2] However, the overall impact of the decision is disturbing: and the case clearly illustrates a number of ways in which the law of sedition appears to go too far in curtailing freedom of expression.

Firstly, although in the particular circumstances, the court laid great stress on the element of ridicule or contempt in the article; and although there is an important difference between the Regulations and the general law of sedition, in this regard (in the former's express reference to 'ridicule'[3]) it must also be acknowledged that the definition of sedition in both North and South is sufficiently wide to enable a court to place an equivalent emphasis on "contempt" - rather than on the excitation of "hatred" - in articles impugned under the provisions of the Criminal and Penal Codes. Thus, the Criminal Code refers expressly to the arousal of either 'hatred' or 'contempt' of government as constituting sedition;[4] and the Penal Code reference to 'disaffection'[5] is sufficiently

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1 This was notwithstanding the fact that the article had appeared in the editorial column. The court was able to distinguish the earlier decision of R v African Press Ltd and another, /1957/ W.N.L.R.1, on the basis that the editor, in the present instance, had given evidence which clearly showed his absence from the newspapers' offices at the time.

2 The importance of mens rea, in general, is discussed below.

3 See p 436 above.

4 See p 412 above.

5 See p 400 above.

broad to include 'contempt' and 'ridicule' within its ambit. It follows, thus, that (as in the present case) an article which is written tongue in cheek[1], and which (although touching on serious issues) is fundamentally light-hearted in its approach - and hence is most unlikely to stir its audience to violence - may well be found to be seditious.

Furthermore, the case graphically demonstrates that defences available under the law of defamation - notably justification (or truth)[2] and fair comment,[3] - have no application under the law of sedition. It also shows that mens rea (in all but the narrow sense of intent to publish an article which is found to offend)[4] does not constitute an element of the offence, the question whether the accused intended in any real sense to excite hatred or contempt against government being accordingly irrelevant.

In short, this case - as well as the Chike Obi decision and other cases discussed above - show the law of sedition being used to stifle criticism and comment which seems entirely legitimate and which cannot seriously be supposed to pose a threat of violence or even disorder. It must of course be

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1 This is particularly evident, for example, in the delightful description of the two publications being the '1962 Manna from Moses of 1962 to the people of Western Nigeria wandering through the wilderness of emergency rule.'.

2 It must, of course, be acknowledged that the Supreme Court in the subsequent case of DPP v Obi, discussed above at p 411, indicated that truth might constitute a defence in some circumstances but gave no clear indication when this would be.

3 The defence of fair comment (as well as that of justification) are further discussed below in the section on Defamation below.

4 The importance of intent in this narrow sense is, of course, acknowledged by the court's acquittal of the editor, who was absent at the time of publication.

recognised that freedom of expression cannot be absolute and that government is entitled (and obliged) to repress utterances which are likely to throw the nation - or any part of it - into violent upheaval. The crucial requirement in this regard, however, is striking an appropriate balance between the two vital interests of free speech and public order; and it is a moot question whether the law of sedition in Nigeria provides a suitable guiding line. Before turning to examine this question further (and to analyse the constitutionality of the law under the Bill of Rights) it is salutary to note the very different principles adopted by the United States of America to the problem of sedition.

## 5.9. The Contrasting Approach of the United States

The well-known case of Schenck v United States[1] provides a convenient starting point for discussion of the contrasting approach of the United States to the law of sedition. Schenck was the general secretary of the Socialist Party, and (in 1917) distributed some 15,000 leaflets urging their recipients to resist the draft - which was (inter alia) described as a 'monstrous wrong against humanity, in the interest of Wall Street's chosen few'.[2] He (and his colleagues) were indicted under the Espionage Act 1917 which - in broad outline - proscribed (inter alia) statements 'construed to cause insubordination or disloyalty in the armed forces, or

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1 249 U.S. 47, 39 S.Ct. 247 (1919).

2 Ibid, at 51.

to obstruct enlistment or recruiting'[1]. Schenck and his co-defendents were convicted by a federal trial court and petitioned the Supreme Court on the basis that the relevant sections of the Act violated constitutional guarantees of freedom of speech and of the press. The appeal was dismissed: and the case is principally noteworthy for the formulation by Mr. Justice Holmes of the 'clear and present danger' doctrine. Holmes acknowledged that 'in ordinary times', the defendants would have been within their constitutional rights in saying 'all that was said in the circular'[2]. However, the times were not ordinary and '/w/hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured'[3]. Much, therefore, depends upon the surrounding circumstances - and Holmes expressed the appropriate test in the following terms:

> 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent'.[4]

The difficulties of applying the 'clear and present danger' criterion were graphically demonstrated some six months later in the case of Abrams v United States[5]. Abrams, a young 'anarchist-Socialist' and five associates had, in

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1 Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 35.

2 Schenck v U.S., supra, at 52.

3 Ibid.

4 Ibid.

5 250 U.S. 616 (1919).

late August 1918, distributed leaflets in the lower East Side of New York which called upon the "workers of the world" to resist Allied and American intervention in Russia against the Bolsheviki: by staging a general strike to prevent the shipment of war materials to the anti-Soviet forces[1]. They were indicted under the Sedition Act of 1918 which went 'considerably beyond its predecessor, the Espionage Act of 1917'[2] and prohibited any '"disloyal, profane, scurrilous or abusive language about the form of government, the Constitution, soldiers and sailors, flag or uniform of the armed forces"', as well as any '"word or act... /opposing/ the cause of the United States"'[3]. They were convicted by a New York court and three of them were sentenced to 20 years' imprisonment plus a fine of $4000 each.[4] Their appeal to the Supreme Court was dismissed by a majority of 7:2.

The decision has been criticised with considerable force[5] and the case is most noteworthy for the dissenting opinion of Mr. Justice Holmes, (Brandeis concurring) in the following terms:

> '/T/he ultimate good desired is better reached by /the/ free trade in ideas... /than by suppression/. /T/he best of truth is the power of the thought to get itself accepted in the competition of the market... Every year if not every day

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1 See Abraham, Freedom and the Court, 4th ed., Oxford, 1982, p 207.

2 Ibid, p 206.

3 Ibid.

4 'The lone girl received 15 years and a $500 fine. One was sentenced to a mere three years. Four years later, President Harding commuted their sentences on condition that they all immediately embarked for the Soviet Union - which they did': See Abraham, ibid, p 207.

5 See Zachariah Chafee, Jr., Freedom of Speech in the United States, Cambridge, Harvard University Press, 1948, Chapter III.

we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[1]'

Six years later the 'clear and present danger' doctrine took a new and disturbing direction in Gitlow v New York[2]. Gitlow was 'an active exponent of extreme left-wing causes and a member of the most radical wing of the Socialist Party'[3]. He was tried and convicted under the Criminal Anarchy Act of 1902 of New York State for having '"advocated, advised, and taught the duty, necessity, and propriety of overthrowing and overturning organized government by force, violence and unlawful means by certain writings" (/these being/ the "Left Wing Manifesto" and "The Revolutionary Age")'.[4] His appeal to the Supreme Court was dismissed by 6:2[5], the majority adopting a test based on 'bad tendency' rather than 'clear and present danger'[6]. Thus, Justice Sanford, delivering the judgment of the Court, pointed out that a 'single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration'.[7] Accordingly, in his view, the State is entitled, in the exercise of its judgment, /to/ suppress the threatened danger in its incipiency'.[8]

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1 Abrams v U.S., supra, at 630, emphasis supplied. In the view of Holmes and Brandeis, 'surreptitious publication of /this/ silly leaflet, posed no such threat'.

2 268 U.S. 652 (1925).

3 Abraham op cit, p 51.

4 Ibid, p 52.

5 Justice Stone did not participate.

6 See Abraham, supra, p 209.

7 Gitlow v New York, supra, at 669.

8 Ibid.

This approach is indeed, a far cry from the 'clear and present danger' test. The criterion thus adopted by the majority was whether the conduct in question had merely a '"bad tendency" to bring about a danger'[1]. Justice Holmes 'thundered'[2] his disapproval, emphasising that Gitlow had made no real attempt to overthrow the government by force, and that his manifesto could be considered an incitement only to the extent that '/e/very idea is an incitement /which/... offers itself for belief and if believed.../may be/ acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth'[3]. If the end result were that the idea of proletarian dictatorship became accepted by the majority, then it should be allowed to prevail - and the entire concept of free speech was meaningless unless each idea was thus given its opportunity for acceptance.[4]

Next came the case of Whitney v California[5], where Ms. Whitney, who had joined the Communist Labour Party of California in

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1 See Abraham, op cit, p 210, who points out that - by framing the test in this way (following a phrase from Schaefer v United States, 251 U.S. 466 (1920) the majority shifted the balance between individual and state significantly towards the latter.

2 Abraham, ibid.

3 Gitlow v New York, supra, at 673.

4 See ibid. Abraham, supra, p 210, points out that Holmes' view appears to have been premised on 'faith in the ability of the American people to choose their destiny' and to see through the false promises of Communist doctrine. Thus, in his view, ideas should be allowed free play - but not overt illegal actions (for these could destroy free choice in the market of ideas).

5 274 U.S. 357 (1927).

1919, was convicted under the state's Criminal Syndicalism Act of 1919, for having assisted in forming (and then having joined) a group 'organised and assembled to advocate, teach, aid and abet criminal syndicalism'[1]. Her appeal to the Supreme Court was unanimously dismissed on the basis that 'the State of California had an inherent right to guard statutorily against the alleged conspiracy'[2]. Though concurring with the conclusion of the Court, Holmes and Brandeis objected to the majority interpretation of one section of the statute which had the effect of making it an offence merely to be in '"association with those who proposed to teach criminal syndicalism"'[3]. This smacked of the Gitlow 'bad tendency' doctrine; and, in an attempt to resurrect and strengthen their concept of the 'clear and present danger' test, Brandeis penned a concurring[4] opinion - stressing the requirement of 'imminence of serious injury' He thus declared.

'Fear of serious injury cannot alone justify suppression of free speech and assembly... /T/here must be reasonable ground to fear that serious evil will result if free speech is practised /and/ /t/here must be reasonable ground to believe that the danger apprehended is imminent...'[5]

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1 Ibid, at 358.

2 Abraham, op cit, p 211.

3 Ibid.

4 Holmes joined in this. It is interesting to note that the concurring opinion - which reads like a dissent - was originally written as such. It was prepared for the case of Ruthenberg v Michigan, 273 U.S. 782 (1927), which was 'mooted by Ruthenberg's death and dismissed that March. Brandeis subsequently seized upon the opportunity of Whitney to 'incorporate the central points of that dissent into what is his concurring opinion for Whitney'. See Abraham, ibid, p 212,n 278.

5 He further explained this by emphasising that 'it must be shown either that immediate serious violence /is/ to be expected or /is/ advocated, or that... past conduct furnishe/s/ reason to believe that such advocacy /is/ then contemplated.' Whitney v California, supra, at 376.

'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion, the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'.[1]

This clarion call for freedom of expression was not, however, to be heeded for a number of years. The Alien Registration Act,[2] commonly known as the Smith Act[3], had been introduced in 1940; and '/t/he heart of its provisions, under Section 2, made it a crime to advocate forcible or violent overthrow of government, or to publish or distribute material advocating violence with the intent to overthrow government'[4] In 1951, in Dennis v United States[5], the Act was used against leading figures in the American Communist Party, who 'were found guilty of a conspiracy to teach and advocate the overthrow of the United States Government by force and violence, and a conspiracy to organise the American Communist Party to teach and advocate the same offences'.[6] The Supreme Court - rejecting contentions that the Smith Act violated the guarantee of freedom of expression contained in the First Amendment (as well as due process guarantees under the Fifth Amendment[7]) upheld its constitutionality by a majority of 6:2)[8].

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1 Ibid, at 377.

2 54 U.S. Statutes 670.

3 So called, after Howard W Smith of Virginia who introduced it. See Nelson & Teeter, op cit, p 37.

4 Nelson & Teeter, ibid.

5 341 U.S. 494 (1951).

6 Abraham, op cit, p 181.

7 It was argued that the Act was too vague to satisfy the due process requirement.

8 Mr. Justice Clark did not participate.

Chief Justice Vinson (in an opinion supported by three others)[1] declared that the court was 'squarely presented with the application of the "clear and present danger" test'[2] - and was satisfied that this criterion was fulfilled in the particular circumstances of the case. He emphasised that '/o/verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech'[3]; and stressed that the 'clear and present danger' test could not require the Government - before taking action - to 'wait until the putsch is about to be executed, the plans have been laid and the signal is awaited'[4]. Nor did it matter whether the attempt to overthrow the state was likely to be successful: 'even though doomed from the outset because of inadequate numbers or power... /it/ is a sufficient evil for Congress to prevent'[5]. Adopting the formula suggested by Chief Judge Hand in the Court of Appeals, Vinson ruled that the correct approach is to ask 'whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'[6]. Applying these principles to the facts, Vinson concluded that the mere 'existence'[7] of this 'highly organised conspiracy, with rigidly disciplined members subject to call when the leaders... felt that the time had come for action'[8] constituted a sufficient danger to justify suppression.

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1 These were Reed, Burton and Minton.

2 Dennis v U.S., supra, at 508.

3 Ibid, at 509.

4 Ibid.

5 Ibid.

6 Ibid, at 510, citing Dennis v U.S. 183 F.2d 201 (1950) at 212.

7 Ibid, at 511.

8 Ibid, at 510.

Concurring opinions were delivered by Justice Frankfurter (who stressed that the judicial branch of government should not lightly interfere with what the legislature had considered appropriate[1]) and by Justice Jackson who 'waving aside the intricate free-speech problem...'[2], concentrated on the conspiracy element of the case.[3]

Vehement dissents were expressed by Justices Black and Douglas. Neither believed that the activities of the defendants constituted 'a danger either clear or present enough to justify what they regarded as a rank invasion of the prerogatives of freedom of expression'[4]. Douglas charged the majority with eroding the requirements of the test it had purported to apply[5], and stressed that:

> 'Free speech - the glory of our system of government - should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent'[6].

He further pointed out that communist doctrine had won little acceptance in the country[7]; whilst Justice Black concluded his opinion with the hope that 'in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society'.[8]

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1 Ibid, at 539, where he emphasised that 'we /judges/ are not legislators, /and/... direct policy-making is not our province'.

2 Abraham, op cit, p 182.

3 Dennis v U.S., supra, where he states that the 'Constitution does not make conspiracy a civil right' (at 572).

4 Abraham, op cit, p 182.

5 See ibid.

6 Dennis v U.S., supra, at 590.

7 Ibid, at 589, where he described Communists in the U.S., as 'miserable merchants of unwanted ideas'.

8 Ibid, at 581.

That hope was realised in June 1957, (by which time, it is interesting to note, 'the Federal authorities had obtained.. 89 convictions under the Smith Act'[1]). Then, however, in Yates v United States[2], the Supreme Court (by a majority of 6:1[3]) severely restricted the application of the statute. Reversing the conviction[4] of 14 Communist Party leaders, the Court emphasised the importance of 'the difference between teaching the need for violent overthrow as an abstract theory or doctrine, and teaching it as a spur to action'[5]. Justice Harlan[6] declared:

> 'The legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action, and that it did not intend to disregard it. The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action'.[7]

Accordingly, it would now have to be proved that 'individuals on trial for alleged violations of the Smith Act had actually intended, now or in the future, to overthrow the government by force and violence, or to persuade others to do so. Moreover, the government would still have to demonstrate that

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1 Abraham, supra, p 183.

2 354 U.S. 298 (1957).

3 Justice Clark dissented and Justices Brennan and Whittaker did not participate.

4 The Court ordered the aquittal of five of the accused, and for the remainder to be retried in accordance with new guidelines.

5 Nelson & Teeter, op cit, pp 40-41.

6 The author of the Court's 'intricate' opinion. See Abraham, supra, p 183.

7 Yates v United States, supra, at 319 - 320.

the language employed by the advocates of actual overthrow was in fact 'calculated to incite to action:..."to do something, now or in the future, rather than merely to believe in something"'.[1]

Following the Yates decision, 'charges against many other defendants in pending cases were dismissed in lower courts /and/ /t/he Smith Act soon lapsed into disuse'.[2] A signal victory for freedom of expression had been won.

The same approach is evident also in the subsequent Supreme Court case of Brandenburg v Ohio[3], in which the Court reversed the conviction of a leader of the Ku Klux Klan for 'advocating the duty or necessity of crime, violence or unlawful methods of terrorism to accomplish political reform'[4]. His conviction had arisen from a televised speech, in which he had stated that the Klan was 'not a revengent organisation, but /that/ if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken'[5]. He added: "We are marching on Congress... four hundred thousand strong".[6]

Citing precedent since Dennis, the Supreme Court declared:

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1 Abraham, op cit, p 183, citing the judgment of the Court, ibid., at 325.

2 Nelson & Teeter, op cit, p 41.

3 395 U.S. 444 (1969).

4 Nelson & Teeter, supra, p 41.

5 Brandenburg v Ohio, supra, at 446.

6 Ibid.

'These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action... A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.'[1]

The advent of the Burger court has seen no narrowing of freedom of expression in this regard[2]. On the contrary, in Landmark Communications Inc. v Virginia[3], Chief Justice Burger 'strongly reaffirmed a tough "clear and present danger" standard upon any legislative attempts to bridle freedom of speech'[4]. He also emphasised that the Court retains the power to determine whether the conditions 'essential to validity under the Federal Constitution[5]' are met.

In summary, thus , the Supreme Court - since the decision in Yates v United States[6] - has adopted an approach which significantly favours freedom of expression (albeit much depends on the manner in which the 'advocacy of action' principle is applied in practice). Notwithstanding this caveat, the Court - by emphasising that the advocacy of belief alone is not enough to justify suppression - has adopted a viewpoint radically different from that expressed by the Nigerian Supreme Court in the Chike Obi[7] case (to

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1 Ibid, at 447 - 448.

2 See Abraham, op cit, pp 214-215.

3 435 U.S. 829 (1978).

4 Abraham, supra, pp 215.

5 Landmark Communications Inc v Virginia, supra at 843-844.

6 Supra.

7 /1961/ 1 All N.L.R. 186. This case has, of course, been previously discussed.

name the most notorious example). The provisions of the Nigerian law of sedition are admittedly different in terms from the United States' statutes discussed above; but in spirit, the law is very much the same. It is submitted that the time has now come for Nigerian courts to shake off the heritage of colonialism in this regard[1] and to draw a clear distinction in future cases between speech designed to advocate the imminent and violent overthrow of government and that which merely criticises government - albeit in strong terms. If Nigerian courts persist in applying the Chike Obi decision, they will be following a path for which no adequate authority exists. In English common law, incitement to violence has long been recognised as an essential ingredient of the offence of sedition. In the United States, the advocacy of action as opposed to belief has belatedly - but strongly - been recognised as a prerequisite to the suppression of the interchange of ideas. The time has now come for Nigeria to take an equal stand in favour of freedom of expression: particularly in the light of the questionable constitutionality of the sedition legislation, as further explained below.

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[1] It will be recalled that the Nigerian Supreme Court relied upon the earlier decision of the Privy Council in R v Wallace Johnson, /1940/ A.C. 231, which had been heavily premised upon the special conditions applicable in the Gold Coast Colony at the time, which (it was alleged) required more severe constraints upon criticism of the government than would have been considered appropriate in Britain itself.

## 5.10. The Constitutionality of the Law of Sedition

It remains to consider the constitutionality of the Nigerian law of sedition. Prima facie, its restrictions infringe the right to 'receive and impart ideas and information without interference' which is guaranteed by s 36 of the 1979 Constitution. However, s 41(1)(a) further provides that this guarantee does not invalidate 'any law that is reasonably justifiable in a democratic society... in the interest of... public safety /or/ public order'. The sedition laws are clearly aimed at securing public safety and public order; and the crucial criterion in determining their validity is accordingly whether they can be considered 'reasonably justifiable in a democratic society' for these purposes.

In answering this question, the first step is to recall some of the more disturbing features of the present law, as previously described. First and foremost amongst these is the width of the definition of sedition in both the Criminal and Penal Codes. Thus, the Criminal Code prohibits the excitation of "hatred", "contempt", "disaffection" and "discontent" against government or the promotion of "ill-will" and "hostility" between different classes; whilst the Penal Code (in s 416[1]) forbids the arousal of "disaffection" against government: not only in Nigeria, but also in the United Kingdom. Only s 417 of the Penal Code is more narrowly framed in its prohibition of an intentional attempt to 'excite hatred or contempt against any class of persons in such a way as to endanger the public peace.'[2]

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1 See the discussion of this section at p 427 et seq., which clearly illustrates the width of the provision.

2 s 417, Penal Code (Northern Region) Federal Provisions Act, discussed above at p 401 and 433.

The next distressing aspect of the law is the refusal - following the Judicial Committee opinion in R v Wallace Johnson - to acknowledge that intent to excite to violence is an essential ingredient of liability. The importance of this safeguard against an overweaning application of the law is well illustrated by the English cases previously described. Moreover, it is also in keeping with fundamental principles of criminal liability that mens rea in this form should be required.[1] Moreover, the Nigerian law contains no equivalent of the United States' principles of 'clear and present danger' or 'advocacy of force' aimed at - and likely to produce - imminent lawless action[2]. Yet the latter are important safeguards too, for the law should not seek to punish a man for urging arson or riot on a busy street corner to people too intent on their own pursuits to stop and listen. The true object of the law of sedition is to prevent the occurence of violence; and it should not go beyond its proper ambit to impose more wide-reaching restrictions.

A further disturbing aspect of the law is the lack of defences it provides. In particular, it is disquieting that truth and fair comment do not constitute defences - though the importance of truth has not, of course, been entirely rejected by the Supreme Court in the Chike Obi case. So long as the

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1 The essence of the offence is excitation to violence (even though the present definitions are wide enough to encompass more than this) and the guilty mind necessary to give rise to liability should accordingly be an intent to cause the very consequence which the law seeks to prevent.

2 See the discussion of the United States approach, culminating in the case of Brandenburg v Ohio, at p 451 above.

definition of sedition is as widely framed as at present, it is vital that these defences be available, as otherwise the person who seeks to draw attention to genuine grievances is indeed in the "Catch 22" situation that the more real and felt the grievance is, the more likely the mention of it (even in the most reasoned and measured terms) is likely to rouse "hatred", "contempt" or "disaffection" against those responsible.

The final disquieting aspect of the law lies in the fact that what is seditious or not (in terms of the present wide definitions) is left to the determination of judges alone, without the assistance of a jury of "twelve good men and true". Yet, as Denning has pointed out,[1] even the most independent judge may be unconsciously influenced by his own predilections (and may not be able to bring a sufficiently open mind to bear upon the question of whether a publication is seditious). Moreover, the definitions are so wide at present that any such decision is intrinsically arbitary; and it is far fairer to the accused - in such circumstances - to invoke twelve opinions rather than to rely on one. This is not to suggest that trial by jury should be introduced in Nigeria for cases of sedition, as this would clearly be impracticable.[2] However, the absence of jury trial underlines the need for narrow formulation of the offence; and for emphasis on the safeguards provided by the need to show

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1 See p 394 above.

2 It will be recalled that trial by jury applies only in Lagos and only in instances where capital punishment may be meted out.

'intent to excite violence' (as in the United Kingdom) coupled with 'clear and present danger' or 'advocacy of immediate force'[1] (as in the United States).

In conclusion, it is submitted that the shortcomings in the present law of sedition in Nigeria as outlined above result in the law going further than is 'reasonably justifiable in a democratic society' to maintain public order and safety. It is accordingly submitted that the present law is unconstitutional; and that it is in need of reform in various ways. Thus, the definition of sedition should be tightened to make it clear that it is excitation to violence that is prohibited. Mens rea in the form of intent to excite to violence should be made a pre-requisite to liability; and so too should the actual likelihood (or reality) of violence resulting from the publication. In this regard, a distinction should be drawn between speech and writing, since the former is more likely to have immediate effect upon its audience. Further, in the context of written publications, a further distinction should be drawn between a pamphlet aimed at a particular group (bound together by existing sense of grievance) and a newspaper intended for circulation amongst the public as a whole; and, as regards the latter, the burden on the prosecution of proving intent to excite violence and the likelihood of its occurring should be recognised as being considerably higher.

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[1] This catchphrase attempts to summarise the principles emphasised by the Supreme Court in Brandenburg v Ohio, described at p 451 above.

Furthermore, truth and fair comment - if not recognised as complete defences (as may not be appropriate under the definition proposed) - should be recognised as powerful factors in mitigation and should serve to exonerate all but the most irresponsible.

Only if these changes are made, will the law strike an appropriate balance between the competing principles of free speech and public order. The present law is far too heavily weighted in favour of the latter and (as the Nigerian decisions previously discussed clearly demonstrate) is capable of being used by government to penalise criticism and comment which should be recognised as legitimate in a society which aspires to democracy. The present law of sedition goes too far. It is unconstitutional; and it must be modified to bring it into line with the guarantee of freedom of expression enshrined in s 36.

# CHAPTER SIX

## THE CIVIL LAW OF DEFAMATION

### 6.1. The Importance of the Law of Defamation for Media Freedom

The law of defamation holds considerable significance for freedom of the media. Under this branch of law, the publication of defamatory matter (as further defined below) may constitute a tort (for which damages are payable to redress the wrong done) or a crime (for which the sanction is either fine or imprisonment). Little special protection[1] against liability for defamation is accorded the media, notwithstanding their primary role in the publication of opinion, information and ideas; and the problems presented to the media by this branch of law are exacerbated by the fact that defamation is, to a considerable extent, a tort or crime of 'strict liability' in the sense (as further described below) that subjective intent to defame is not an essential requirement for liability under either the civil or criminal law. Thus, not only may defamation be 'unintentional',[2] but the chain of liability is commensurately far-reaching; and those who are only peripherally involved in the publication of defamatory matter through the media (such as the street

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1. There are exceptions to this general principle, as evidenced - for example - by the requirement that the leave of a judge in chambers is necessary in order to institute a criminal prosecution for defamation against those responsible for the publication of a newspaper containing defamatory material, as further described at p. 604 below.

2. Liability for 'unintentional' defamation and the steps which have been taken in England and in some parts of Nigeria to cater for this difficulty are described at p 516 below.

vendor of a newspaper or the technician engaged in the production of a radio or television broadcast) may be held liable under the law: even though they cannot be said, in any real sense, to have intended to defame.

The Nigerian law of defamation is part of the body of English law which applies within the country by virtue of the general reception process previously described.[1] In England itself - the country of origin of the rules of defamation here in issue - considerable attention has recently been given to the need for reform of the law. An investigative body, the Committee on Defamation, issued a report on the law (in both its civil and criminal aspects) in 1975[2] and has recommended a number of changes in the law as further described in due course. It seems, however, that there is considerable force in the recent dictum of Lord Diplock in the House of Lords in Gleaves v Deakin and others[3] that 'the law of defamation, civil as well as criminal, has proved an intractable subject for radical reform.[4] In Nigeria, the recipient of the English laws of defamation with all of their difficulties - especially for the media - the need for reform is no less strong; but to date (perhaps because of all the other pressing problems facing the country as a developing

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1. The process whereby Nigeria has received a considerable body of English law has previously been described in the section on the Sources of Nigerian Law, at p 129 et seq. The sources of the Nigerian law of defamation are described in further detail at p. 643 et seq.

2. Report of the Committee on Defamation, Cmnd. 5909, 1975. The Committee was presided over by Mr Justice Faulks, and its report is commonly known as the Faulks Report.

3. [1979] 2 All E.R. 497 (H.L.(E)).

4. Ibid., at 499.

nation), it seems that the same sort of comprehensive analysis and review as has recently been effected in the United Kingdom - through the Committee on Defamation - has not yet been implemented. It is accordingly proposed to examine the rules of defamation in some detail in an endeavour to provide a more comprehensive analysis than has previously been attempted in existing Nigerian texts on defamation;[1] and to suggest an alternative approach - based upon the experience of the United States of America - which may serve to meet some of the more pressing problems, The law of civil defamation will be examined in this chapter; and the criminal law of defamation in the one following: and, in each case, an attempt will then be made to review the law in general and to assess its constitutionality in the light of the guarantee of freedom of expression contained in the 1979 Constitution.

## 6.2. The Significance of the Law of Civil Defamation

From the viewpoint of the media, the law of civil defamation in Nigeria undoubtedly has considerable significance, as Kodilinye graphically describes:

> 'The immediate post-independence period in Nigeria was characterised by vigorous political activity supported by an articulate and free press. It is significant

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1. See, for example, A.V.J. Nylander 'Defamation and the Press', in T.O. Elias (ed.), Nigerian Press Law, 1969, pp. 16-34; the discussion by C.O. Okonkwo, 'The Law of Torts' in C.O. Okonkwo (ed.) Introduction to Nigerian Law, 1980, pp. 265-6; the material on 'Defamation' in McNeil & Rains, Nigerian Cases and Statutes on Contract and Tort, 1965, pp. 311-372; the chapter on 'Defamation' in Kodilinye, The Nigerian Law of Torts, 1982, pp. 131-176; and the chapter on 'Defamation' in C.O. Okonkwo in Criminal Law in Nigeria, 1980, pp. 279-283.

> that the plaintiffis in defamation actions in the early 1960s included most of the leading political personalities of the time, and that there was hardly a national newspaper which was not a defendant in at least one such action during the period. With the advent of military rule, defamation actions no longer featured "battles" between politicians and the press, or between politicians themselves, and the great increase in road traffic, and therefore road accidents, in the 1970s ensured that negligence superceded defamation as the most frequently litigated tort'. 1

However, as Kodilinye is quick to acknowledge, the situation which pertained during the 1970s may well change in the future, with the return of the country to civilian rule; and defamation may well, again, become one of the most frequently litigated torts. In any event, the high incidence of defamation suits during the 'First Republic'[2] and the clear correlation between these and 'vigorous political activity'[3] plainly shows the significance of the civil law of defamation - both in general, and also for the media especially: for the media inevitably constitute major channels for the publication of comment and criticism on contentious political issues.

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1. Kodilinye, op cit, p.131

2. This is, of course, the name given to the initial post-independence period which terminated with the military coup of January 1966. The era which began with the return of civilian rule under the 1979 Constitution is known as the 'Second Republic', as described in the section on the History of Nigeria, at p 111 above.

3. See p. 545 et seq.

## 6.3. The Sources of the Law of Civil Defamation

In general, the law of defamation (both civil and criminal[1]) forms part of the body of English law which has been received into Nigeria in the manner previously described in the section on the Sources of Nigerian Law.[2] Thus, by virtue of this reception, English common law rules relating to defamation as well as statutory principles relevant to defamation contained in English statutes of general application, in force in England on 1 January 1900[3] are the principal sources of the Nigerian law of defamation. In addition, in the context of the law of civil defamation,[4] a number of important rules have been introduced by Nigerian legislation. The Nigerian statutes in question are the Defamation Law 1961,[5] applicable in Lagos State, and the substantially similar Defamation Laws of the eastern and western states.[6] No such legislation has been introduced in the northern states, thus leaving a lacuna in the law of defamation as it applies in the North which can only be described as unfortunate. The Defamation laws which have been introduced in the southern states are largely modelled on the United Kingdom Defamation Act 1952 which introduced a number of important reforms - especially as regards the defence of

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1. The criminal law of defamation is described in Chapter Seven.

2. See p. 130 above.

3. See p. 131 above.

4. The word 'civil' is here stressed because different legislative rules have been adopted, in the context of criminal defamation, in the Criminal and Penal Codes, as further explained in Chapter Seven.

5. Cap 34, (Laws of the Lagos State of Nigeria, 1973).

6. Defamation Law (eastern states), Cap. 33 (Laws of Eastern Nigeria, 1963) and Defamation Law (western states), Cap 32 (Laws of the Western Region of Nigeria, 1959). For the sake of convenience, these statutes are subsequently referred to as Defamation Law (eastern states), Cap 33; and Defamation Law (western states) Cap 32, or (in yet more abbreviated form) as E.S. Cap 33 and W.S. Cap 32.

'unintentional defamation', as further explained in due course.[1] It is thus regrettable that these reforms have not been implemented in the North - an area which is far larger than the South and which contains the majority of the population.

The difference in the law applicable to defamation in the northern and southern parts of Nigeria also generates complex 'conflict of law' questions. Say, for example, that a newspaper was produced and printed in Lagos, but distributed in a northern city such as Kano, and contained an article which was 'unintentionally' defamatory within the meaning of the statutory defence provided by the Defamation Law 1961, applicable in Lagos but not in the North. Should the laws of Lagos State be applied - on the basis that this is the area of origin of the tortious act? Or should the law of northern Nigeria govern, on the ground that it is here that the defamatory article has been read and hence here that the tort has produced its harmful effect? Determining the proper law of a tort in a situation where two or more sets of conflicting rules are arguably applicable is, of course, a question of great complexity;[2] and further consideration of this problem lies outside the scope of this study. The difficulty serves to demonstrate, however, the need for reform of the law of defamation in the North - so as, at minimum, to bring it into line with that applicable in the southern areas of the country.

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1. See p. 516, et seq.

2. Texts on the topic of conflict of laws are too numerous to list, but some idea of the complexities is provided in O. Kahn-Freund, General Problems of Private International Law, Leyden, 1976.

## 6.4. The Distinction between Libel and Slander

Libel is the publication of defamatory matter in permanent form (such as writing) and slander is the publication of such matter in transient form (through words or gestures).[1] The reason for this distinction is obscure[2] and, in the United Kingdom, it has been recommended that it should be abolished, and that the rules governing slander should be assimilated to those relating to libel.[3]

The distinction has given rise to particular difficulty with the growth of radio and television, since broadcasts are frequently based upon scripts previously written. This problem is illustrated by Mukete and others v Nigerian Broadcasting Corporation[4] in which the plaintiffs claimed damages for alleged defamation contained in a broadcast issued by the Nigerian Broadcasting Corporation. They failed to allege special damages - a vital element of a claim for slander in the circumstances[5] - so that the question whether the broadcast constituted libel or slander was crucial. The trial court held that it was entitled to infer that the broadcast had been read from a written script (which meant that it would rank as libel).

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1. Nylander, ibid, p. 17; Duncan & Neill, Defamation, London, 1978, p. 4; and Robin Callender Smith, Press Law, London, 1978, p. 5.

2. Nylander, ibid; and Report of the Faulks Committee, Cmnd 5909 , 1975, Appendix VI, 1975 .

3. Report of the Faulks Committee, ibid, para 91; Duncan & Neill, op.cit., p.4.

4. [1961] 1 All N.L.R. 482.

5. As further explained below, slander is actionable per se only in five sets of circumstances; and in all other instances the plaintiff's claim can only succeed if he alleges and proves that he has suffered special damage, as further clarified below.

The Supreme Court, however, ruled that the lower court should not have inferred this without proper evidence, 'as the internal arrangements of the Corporation [could] not be regarded as a matter of common knowledge'.[1] Hence, in the Court's view, the broadcast was 'slander' and the claim could not succeed.

In southern parts of Nigeria, at least, the matter has now largely been clarified by legislation which provides, in essence, that material broadcast for general reception is to be regarded as having been published in permanent form and as subject, therefore, to the law of libel. Thus, for example, s 3 of the Defamation Law 1961[2] provides:

> 'For the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form'.

The law defines 'broadcasting by wireless telegraphy' as meaning, in essence, broadcasting for 'general reception', so that broadcasting otherwise than for general reception is not covered by the statute and continues to be governed by the common law - under which classification as libel or slander depends on whether or not the broadcast material is in fact read from a written script.

Television is not expressly covered by the Nigerian Defamation Laws - except in the eastern states where the relevant legislation defines broadcasting as including television. However, it is submitted that television broadcasts for general reception are indeed covered by

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1. Mukete v Nigerian Broadcasting Corporation, supra, at 483.

2. Cap 34, Laws of Lagos State, applicable only in Lagos State. However, substantially similar provisions are contained in s 2 Defamation Law (eastern states) Cap 33 and s 3 Defamation Law (western states) Cap 32.
These provisions are all based on s 1 of the United Kingdom Defamation Act of 1952.

the Lagos' and western states' laws, both of which provide that references in the legislation to 'words' (as in s 3 above) are to be construed as 'including a reference to pictures, visual images, gestures and other methods of signifying meaning'.[1]

The practical significance of the distinction between libel and slander lies in the differing elements of the torts. To succeed in an action for slander, the plaintiff (in addition to the other essential requirements)[2] must - except in five instances - prove that he has suffered "special damage" as a result of the slander, in the form of some material or temporal loss, capable of assessment in pecuniary terms, such as dismissal from employment.[3] By contrast, 'in the case of a libel the law presumes that the publication has caused damage to the plaintiff, and it is not necessary for the plaintiff to prove that he has suffered damage in order to establish a cause of action'.[4]

The five exceptional cases, where slander is actionable per se and without proof of special damage, involve statements of the following kinds:

(a) those imputing the commission of a criminal offence punishable by imprisonment;[5]

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1. See, for example, s 2(1) Defamation Law, 1961.

2. These requirements are discussed in turn in the text below.

3. Duncan & Neill, op.cit., p. 7. See also Kodilinye, op.cit., pp. 139-140.

4. Duncan & Neill, ibid. This is one of the most important aspects of the law of defamation and is part of the reason why the law - at present - is so heavily weighted in the plaintiff's favour. Normally, in proceedings for tort, the plaintiff's claim cannot succeed unless he is able to prove that he has suffered actual loss as a result of the wrongdoing. The fact that the plaintiff is excused from this burden in the civil law of defamation constitutes a considerable advantage to him.

5. Hellwig v Mitchell [1910] 1 K.B. 609.

(b) those imputing certain contagious or infectious diseases;[1]

(c) those imputing unchastity or adultery to any woman or girl;[2]

(d) those calculated to disparage a person in any office, profession, trade or business;[3]

(e) those (in Eastern states of Nigeria only) imputing that a person is an osu.[4]

There is also a difference in the available defences in that a claim for slander (unlike libel) may be defeated by evidence that the words spoken - in the particular circumstances - amounted to no more than vulgar abuse and were so understood by those who heard them, with the result that the plaintiff's reputation suffered no harm in fact.[5] 'If, however, the words are written, not spoken,

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1. This applies to imputations of venereal disease, leprosy and (probably) the plague. See Duncan & Neill, op.cit., p.22, n.4.

2. Slander of Women Act, 1891, E.S. Cap 33, s 5; W.S. Cap 32, s 4.

3. Defamation Law, 1961, s 4; E.S. Cap 33, s 4; W.S. Cap 32, s 5.

4. The Osu caste system, under which legal and social disabilities were imposed on 'osus' existed in various parts of the former Eastern Region and was abolished by the Abolition of the Osu System Law, Laws of E.R. Cap 1. S. 8 of the Law states:

> 'Words spoken or published which impute that a person is Osu shall not require special damage to render them actionable'.

The term 'osu' may, in broad outline, imply that an individual is 'an unclean person, an untouchable and [one] not fit for a decent human society', as contended in Nwashukwu v Nnoremele, (1957) 11 E.L.R. 50. However, its precise meaning varies from one locality to another and must accordingly be proved in proceedings for slander, as confirmed by this case (where the plaintiff's claim failed by virtue of failure to prove the meaning of the term).

5. See, for example, Ajala v Adelagun (1979) 3 L.R.N. 28 where plaintiff was called, by her husband's mistress, a thief and a prostitute, and the court found that these words were 'spoken merely as general vituperation or abuse and were so understood by the hearers'. See also Olakunori v Olutajin (1972) 2 U.I.L.R. 226 (plaintiff called a 'bastard' at a family meeting - mere vulgar abuse).

they cannot be protected as mere vulgar abuse, since ... readers may know nothing of the circumstances which lead to the publication'.[1] Hence vulgar abuse is no defence to an action for libel.

This principle is illustrated by the case of Awolowo v West African Pilot and another.[2] Here the court rejected the defendant's plea that an article criticising Awolowo (as, inter alia, being prepared to bribe his way into top positions) was simply vulgar abuse of a political opponent and would have been so understood by its readers. The court did so on the basis, inter alia, that 'vulgar abuse' can only be a defence to slander - not libel.

Apart from the above exceptions, the rules governing libel and slander are essentially the same; and, in the remainder of this section, it is proposed to refer to libel only, since the principles described apply equally to slander.[3]

## 6.5. The Ingredients of a Prime Facie Case

In order to establish a prima facie case, the plaintiff must prove:

(1) that the words in question refer to him;

(2) that their meaning is defamatory of him; and

(3) that they were published by the defendant.

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1. Nylander, op.cit., pp. 19-20.

2. [1962] W.N.L.R. 29.

3. For further detail regarding the differences between libel and slander, as well as the circumstances in which slander is actionable per se, see Kodilinye, op.cit., pp. 135-139.

6.5.1. Reference to the Plaintiff

Where the words in issue identify the plaintiff by name, this ingredient is normally[1] easily established. Where, however, the plaintiff is not so identified, it is necessary for him to show that 'reasonable persons [would] reasonably [have] believed[d] that the words referred to [him]'.[2] The following cases may serve to illustrate the problem.

In Williams and others v The West African Pilot Ltd.,[3] the plaintiffs claimed to have been defamed through the publication in the West African Pilot, during March and April 1959, of a series of ten cartoons describing the fraudulent means by which the Action Group had sought to win the 1951 elections to the Western House of Assembly.[4] The content of these cartoons, is described in further detail below, in the section analysing the impact of the laws of defamation on the expression of political dissent and criticism.[5] The significance of the case, for present purposes, is that the plaintiffs were not named in any of these cartoons, which featured three principal characters identified as 'the Brain', the 'Propagandist' and the 'Fuehrer'. The question whether these cartoon characters could reasonably be identified with the three plaintiffs by the ordinary reader was therefore of vital importance. The plaintiffs provided the following evidence, inter alia, of identification:

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1. Complications may, of course, arise where two or more persons have the same name.

2. Duncan & Neill, ibid.

3. [1961] W.N.L.R. 330.

4. See the section on the History of Nigeria, at p. 82 above.

5. See p. 545 et seq.

(a) the first plaintiff (Rotimi Williams) was described in other issues and pages of the newspaper as "the brain behind the Action Group",[1] and was of "immense and generous physical proportions",[2] as was the cartoon character described as 'the Brain';

(b) the second plaintiff (Akintola) had been described in other issues of the paper as the "Nigerian counterpart of the German Goebbels"[3] (who was, of course, Hitler's Minister of Propaganda) and had prominent tribal markings on his face similar to those depicted on the face of the cartoon character, the 'Propagandist';

(c) the third plaintiff (Awolowo) was popularly known as the Leader of the Action Group, wore spectacles at all times (as did the cartoon character, the 'Fuehrer') and commonly wore a cap (which had become popularised as an Awolowo cap) similar to that worn by the 'Fuehrer' in the cartoon.

In addition, there was a strong pictorial resemblance between the cartoon characters and each of the three plaintiffs.

The court held that the cartoons were capable of referring - and did, in fact, refer to the plaintiffs[4] and - this first hurdle to a successful claim being overcome - it went on to consider other aspects of the action, which are discussed below.[5]

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1. Williams & others v West African Pilot Ltd., supra, at 333.

2. Ibid., at 335.

3. Ibid., at 336.

4. Ibid., at 341. This dual test is laid down in Knupffer v London Express Newspaper Ltd. [1944] A.C. 116 at 119 and has been applied in a number of Nigerian cases, such as Awolowo v Zik Enterprises Ltd. and others, (1955) 14 W.A.C.A. 696.

5. See p. 497 - 498 and 546 - 548, inter alia.

In Bakare v Oluwide and others,[1] the plaintiff claimed damages against the editor, printer and publisher of a newspaper called the "Nigerian Socialist" which, on 27 April 1968, had published the following article under the caption - "Aspects of Nigerian life - the man of means":

> 'Not all Nigerians are poor, hungry, naked,unemployed and fatigued by toil. There are quite a few whose tables are decked with venison and choice wine, whose palaces are built to face the ocean breeze, who lounge in their luxury clubs built with public funds in workers' residential areas, who attire themselves in gold chains and beadly HATS, who are opulent enough to sleep at traffic lights in their Rolls Royces, who are philanthropic enough to purchase a single copy of a reactionary journal for £200, who build harems of teenage beauties to caress their fat necks and obese tummies, who exploit the labour of dockworkers with the Public capital, who are funded by the C.I.A. to create their generous images and to corruptly pressurise men of power in politics, who can hold double chieftaincy titles, and plots and plots of land, who can be redeemed and obtain the Queen's pardon for their criminal jail terms,who extravagantly pass the night by doling out notes to their dancing leaguemen and kinswomen at night orgies while they sleep through the day; when we toil and labour to keep their aimless wasteful and immoral lives going.
>
> Such man is The Man of Means in Nigeria; who makes up 1% of the population and owns 90% of the wealth of the land. The man of means has got means in his stomach, a red account at his condescending local foreign bank, and properties galore to play with. The man of means is he who lacks taste but lives in wanton gluttony. Poor man. It needs the struggle of Nigeria to free him, to tutor him, to divest him of his ill-gotten gains and to purge his tummy of the pork-chop and alcohol that restricts his breathing'. 2

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1. [1969] 2 All N.L.R. 324.

2. Ibid., at 324-325.

The plaintiff - though not expressly named - contended that the article referred to him and produced the following evidence in substantiation:

(1) he lived in a palatial house which faced Victoria Island and enjoyed 'the ocean breeze';

(2) he ran the Suru-Lere Night Club, which had indeed been built with public funds and was situated in a working class residential area;

(3) as a traditional chief, he wore gold chains and hats made of beads;

(4) he owned a Rolls Royce car;

(5) he had donated £250 towards the launching of Scope magazine;

(6) he had four wives;

(7) he employed dock workers;

(8) he held double chieftaincy titles (being the Sobaloju of Lagos and the Saloro of Ilesha;

(9) he had been given a State Pardon in respect of a previous conviction in 1967;

(10) he owned many properties.[1]

Furthermore, the article had been published in conjunction with a cartoon - and this bore a marked resemblance to the plaintiff.[2]

The court (per Adedipe, J. ) accordingly concluded 'that [t]he words used particularly point[ed] to the plaintiff'; and that the article 'refer[red] to the plaintiff and the plaintiff only'.[3] It accordingly rejected the defendents' plea that the article referred only to a general class of people and proceeded, (as described at p.494 below).

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1. Ibid., at 331-332.

2. Ibid., at 332.

3. Ibid.

to award the plaintiff damages for libel in the sum of £2000.

In Dalumo v The Sketch Publishing Co Ltd.,[1] the defendants published an article in the Daily Sketch newspaper alleging that 'top officials of the Nigerian Airways Corporation' had taken oaths of secrecy 'not [to] expose any form of corruption, mismanagement or patterns of irregularity within the company'.[2] The plaintiff - who was Acting Secretary of Nigeria Airways - successfully claimed damages for defamation.

In Dafe v Tsewinor and another,[3] the plaintiff claimed that he had been defamed through the publication in the Mid West Champion of an article headed "How the Ika-Ibo Merger Came About" and describing how a 'Minister from Aboh' had gone to meet, draw up and ultimately sign a memorandum of agreement with Lt-Colonel Ojukwu. The plaintiff, who fitted this description, contended that the article referred to him; and the court (per Idigbe, C.J.,) accepted this contention and rejected the defendants' plea that the article could also have referred to another, and more junior, minister from Aboh.

The principles which emerge from these and other[4] cases appear to be as follows:

(a) the test is a two-fold one:

(i) are the words in question reasonably capable of referring to the plaintiff';

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1. [1972] 1 (Part 2) All N.L.R. 130.

2. Daily Sketch, 15 July 1968, reproduced at

3. [1967] N.M.L.R. 331.

4. See, for example, Awolowo v Zik Enterprises and anor (1955) 14 W.A.C.A. 696 and Ukpoma v Daily Times of Nigeria Ltd., (1979) 2 L.R.N. 357. English cases are, of course, of considerable persuasive authority and for an indication of the most important of these, the reader is referred to Duncan & Neill, op.cit., pp. 24 - 30 and to Callender smith, op.cit., pp. 8 - 11.

and (ii) if so, were they in fact understood as so referring by the reasonable reader?[1]

(b) the above test is an objective one, and whether the defendant intended to refer to the plaintiff or not is accordingly irrelevant.[2]

(c) where reference to the plaintiff derives from extrinsic facts or circumstances, these must be pleaded and proved by the plaintiff.[3]

(d) where the words, prima facie, are defamatory of a class, a particular individual may nevertheless successfully claim damages for defamation if the words would reasonably be understood as referring to him - either solely,[4] or as one member of the class in question.[5]

6.5.2. The definition of 'defamatory meaning'

A catch-all definition of 'defamatory' is extremely difficult to crystallize. The classic definition of a defamatory publication is one 'which is calculated to injure the reputation of another by exposing

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1. See Knupffer v London Express Newspaper Ltd., [1944] A.C. 16, applied in Awolowo v Zik Enterprises and anor, (1955) 14 W.A.C.A. 696 and in Williams and others v West African Pilot Ltd., [1961] W.N.L.R. 330 at 341.

2. See Bakare v Oluwide and others, [1969] 2 All N.L.R. 324 at 334, applying Hulton & Co v Jones, [1910] All E.R. 29.

3. See the 'Williams' and 'Bakare' cases, supra, and Duncan & Neill, op.cit., p. 25.

4. See the 'Bakare' case where the court quoted, with approval, the following dictum from Le Fanu and others v Malcomson and others (1848) 9 English Reports 910 "Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter". See 334 of the judgment ibid.

5. See, for example, Dafe v Tsewinor and anor, supra, at 332:'Where a defamatory article refers to two different persons, both or either can sue for damages'. The same will apply to a larger class,

(...continued)

him to hatred, contempt or ridicule'.[1] Subsequent cases, however, have revealed the limitations of this concept, which is too narrow to cater for the dentist (or other professional) who is said to lack the appropriate degrees of professional skill or expertise;[2] or the woman who finds her friends avoiding her (out of sympathy), following disclosure that she has been the victim of rape.[3] In the United Kingdom, the Committee on Defamation has attempted to overcome the difficulties by suggesting that defamatory material be defined as 'matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally'.[4]

The Nigerian courts seem generally to apply the tests of whether the words in issue 'tend to lower the Plaintiff in the estimation of right thinking members of the society' or would tend to cause [such members] to shun or avoid the plaintiff'.[5] In determining the meaning of the words in question, the following principles apply:

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...continued
provided the plaintiff can provide sufficient evidence that reasonable persons would regard him as falling within the class. Clearly, as the size of the class increases, this onus becomes progressively more difficult to discharge'.

1. Parmiter v Coupland, (1840) 6 M. & W. 105 at 108 per Poske B.

2. Drummond-Jackson v British Medical Association [1970], 1 All E.R. 1094 & 1104, per Lord Pearson.

3. Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd., (1934) 50 T.L.R. 581 & 587, per Slesser L.R.

4. Cmnd. 5909, 1975, para 65. See, however, the criticism of this suggestion by Duncan & Neill, op.cit., at p. 35, who point out that 'it is doubtful whether a single definition is adequate to cover every kind of case that may be encountered in practice' and suggest that it may be better to leave the question to judicial determination in the cases as they arise, using the definitions which have already been formulated.

5. See, for example, Ohanbamu v Midwest Newspapers Corp and anor [1974] 6 C.C.H.C.J. 763 at 780-781.

'The judge ... has to consider what is the natural and ordinary meaning in which these words would be understood by reasonable men to whom they were published. In determining whether the words are capable of a defamatory meaning, the judge should construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence who are neither unusually suspicious nor unusually naive'.[1]

The following selection of Nigerian cases may serve to illustrate the types of statements which the courts have held to be defamatory.

(a) In Williams and others v The West African Pilot Ltd,[2] the court found the allegations (discussed in greater detail below)[3] that the plaintiffs had plotted to win the 1951 Western Region elections by corruption and thuggery (and, later, to subvert their true result which was in favour of the opposition party, the N.C.N.C.)[4] were prima facie defamatory of them.

(b) In Ohanbamu v Midwest Newspapers Corp. and anor,[5] the court found that the plaintiff had been defamed by allegations in a newspaper article that, inter alia, he was amongst the 'corrupt intellectuals' who 'should know better' but are in fact 'ambitious, greedy,... without principles and without ethics'.[6]

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1. Omo-Osagie v Okutubo [1969] 2 All N.L.R. 175 at 179 per Adefarasin, J.

2. [1961] W.N.L.R. 330.

3. See section on the impact of defamation laws on the expression of political dissent or criticism, at p.545 below.

4. For a brief description of the N.C.N.C., see the section on the History of Nigeria, at p. 77 above.

5. [1974] 6 C.C.H.C.J. 763.

6. Ibid., 780 and 781. This decision, with respect, seems wrong - for the Court seems entirely to have overlooked the disclaimer in the article that this general description of "intellectuals" as a class did not, in fact, apply to the plaintiff. See 778, where Dr Ohonbamu is acknowledged as being one of the exceptions, as further discussed at p.555 below.

(c) In Awolowo v Kingsway Stores (Nig) Ltd and anor,[1] the allegations that the plaintiff had been implicated in a crime involving violence and that he had failed to promote 'its proper investigation' were held to be defamatory.

(d) In Nwangwu and others v Nwankwo,[2] a description of the plaintiff (a member of the Eastern Region House of Assembly) as 'a wolf among men and lambs, a parasite who thrives at the expense of the people...' was found defamatory.

(e) Within a slightly different context, notice of dishonour of a cheque has been found defamatory of the drawer,[3] but the mere statement that the plaintiff has failed to pay his debts has not been so considered.[4] On the other hand, and somewhat surprisingly, implications of abuse of office (using confidential information to obtain a lucrative contract, or acceptance of the highest (instead of the lowest) tender by a director of a public corporation)[5] have been held not to be defamatory.

(f) An illustration of an allegation of professional incompetence constituting defamation is provided by the case of Okon v The C.O.R. Advocate Ltd and others.[6] Here the defendants had published an article in a local newspaper alleging that the plaintiff - the

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1. [1968] 2 All N.L.R. 217.

2. (1962) 6 E.R.L.R. 97.

3. Adeleke v National Bank of Nigeria Ltd., (1978) 1 L.R.N. 157.

4. Karunwi v Wema Bank Ltd and another [1973] 5 C.C.H.C.J. 61. Osisanya v Caretaker Committee of L.C.C. [1974] 5 C.C.H.C.J. 565.

5. Johnson v The Daily Times of Nigeria Ltd and anor [1965] L.L.R. 110; and Egbuna v The Amalgamated Press of Nigeria Ltd and anor [1967] 1 All N.L.R. 25.

6. (1961) 5 E.N.L.R. 21.

principal of Duke Town Secondary School - was 'ruining it and was responsible for its falling educational standards. This was found prima facie defamatory.[1]

In addition, it has been held defamatory to state:

- 'that a medical practitioner had a "fake" degree and that he exploited the public;[2]...
- that a public official had been arrested on suspicion of corrupt practices;[3]
- that a legal practitioner had defrauded his clients;[4]
- that a university lecturer had committed adultery with a female student;[5]... and
- that a tenant had "brought a strange people into the house day and night, smoking nauseating substances".[6]

In determining whether matter is 'defamatory', the interpretation or construction of the words in issue is, of course, crucial. It is

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1. This case is discussed further at p. 559 below.
2. African Press Ltd., v Ikejiani (1953) 14 W.A.C.A. 386.
3. Ukpoma v Daily Times of Nigeria Ltd. (1979) 2 L.R.N. 357.
4. Lardner v The Sketch Publishing Co. Ltd., (1979) 3 L.R.N. 276.
5. Nthenda v Alade (1974) 4 E.S.C.L.R. 109.
6. Mutual Aid Society Ltd v Akerele [1966] N.M.L.R. 257.

These examples are all derived from Kodilinye, op.cit., p. 133.
For further illustrations, see,
Awolowo v West African Pilot Ltd and others [1962] W.N.L.R. 29.
Anunobi v Nigerian National Press Ltd and another [1964] L.L.R. 12.
Benson v West African Pilot Ltd [1965] L.L.R. 175.
Okolo v Midwest Newspaper Corporation and others [1974] 2 C.C.H.C.J. 203.
Adewunmi v Oshinowo [1977] 2 C.C.H.C.J. 187.

acknowledged that, in approaching this task, the courts should not apply the formal principles of interpretation applicable to statutes or wills, but should instead consider the likely effect of the words used on ordinary people, bearing in mind that 'the layman's capacity for implication is much greater than the lawyer's'.[1] It has also been acknowledged that words - by virtue of special circumstances - may have implications extending beyond what would appear to be their 'natural and ordinary meaning'. In such instances, the defamatory words are said to have an 'innuendo' meaning - which confers upon the plaintiff (assuming he can prove the innuendo, as discussed below) a distinct and separate cause of the action, additional to the one[2] arising from the natural and ordinary meaning of the words.

The distinction between 'natural and ordinary meaning' and 'innuendo meaning' may be summarised as follows:

(a) The former meaning is that 'in which the words would be reasonably understood by ordinary people using their general knowledge and commonsense'.[3]

(b) An innuendo meaning is a special meaning - additional to the natural and ordinary meaning - which a word may bear by virtue of:

(i) extrinsic facts or circumstances

(ii) technical, slang or local meaning not generally known.[4]

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1. Lewis v Daily Telegraph, Ltd [1964] A.C. 234 at 277 per Lord Devlin.

2. It may, of course, be that a word has only an innuendo meaning - by virtue of some special technical or slang construction known only in a particular trade or locality - and not by the general population at all. See Duncan & Neill, op.cit., p. 18.

3. Duncan & Neill, ibid., p. 10.

4. Duncan & Neill, ibid., pp. 17-18.

Where the plaintiff wishes to rely on an innuendo meaning, he must plead and prove the facts or circumstances (or the technical or slang meaning) on which he relies - for these are an essential part of his cause of action. There may be difficulty, however, in distinguishing a true innuendo from what is, in any event, part of the natural and ordinary meaning of the words - as the following decision may demonstrate.

in Adedoyin v Nigerian National Press Ltd and anor,[1] the plaintiff claimed damages for libel against the defendants, arising out of their publication in the Nigerian Morning Post of an article headed "Drag-net for two as Adedoyin reported missing" and their display, on the same day, of posters all over the country stating "SPEAKER ADEDOYIN MISSING". The article read as follows:

> "Drag-net for two as Adedoyin reported missing
>
> WANTED: ENAHORO ADEBANJO
>
> In Lagos yesterday, the police declared two top Action Group members as "wanted men."
>
> The men are Chief Anthony Enahoro, Opposition Spokesman on foreign affairs and Mr. Ayo Adebanjo, an Ibadan lawyer, and one-time president of the U.K. branch of the party.
>
> Also yesterday, it was reported that the Speaker of the suspended Western House of Assembly, Prince Adeleke Adedoyin, had been missing for days.
>
> Two days ago, police were reported to have searched Prince Adedoyin's residence in Ibadan and it was reported that nothing incriminating was found.
>
> Usually reliable sources said in Lagos yesterday that the imposition of a house arrest on Chief Awolowo is not unconnected with the present investigations which have led to seizure of arms and ammunitions in several parts of the country."

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1. [1964] 2 All N.L.R. 9.

2. Nigerian Morning Post, 24 September 1962, reproduced at 10-11 of judgment ibid.

The plaintiff alleged that the words were defamatory in their ordinary and natural meaning, and also by virtue of their innuendo - that 'the plaintiff ha[d] gone into hiding as he [was] involved in the illegal importation of arms and annunitions into the country'.[1] The plaintiff led 'a good deal of evidence about the conditions prevailing in Western Nigeria at the time of the publications',[2] in support of the innuendo alleged - and the court came to the conclusion that the article was defamatory in both meanings.[3] The court appears thus to have accepted that the article contained a true innuendo - whereas, it is submitted, it is strongly arguable that (within the context of the article as a whole with its reference to investigation into the 'seizure of arms and ammunitions'), the implication that the plaintiff was involved in the illegal importation of arms was part of the natural and ordinary meaning of the statements that he 'had been missing for days' and that 'police were reported to have searched [his] residence ... and ... [to have found] nothing incriminating...'.[4]

In the circumstances, this criticism is of no great moment - but it does illustrate the difficulty of assessing when reliance should be placed on innuendo; and this may have important ramifications in practice because of the requirement that the plaintiff must plead the special circumstances in which he relies to substantiate an 'innuendo' meaning - with the result that his statement of claim

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1. Adedoyin v Nigerian National Press Ltd., supra at 11.
2. Ibid., at 12.
3. Ibid., at 13.
4. See paragraphs 3 and 4 of the article in question.

will be bad in law if he fails to do so.[1]

6.5.3. Publication by the Defendant

In the civil law (as opposed to the criminal law)[2] publication of defamatory matter to the plaintiff alone is not enough to found a cause of action. The plaintiff must show that the matter in question has been published by the defendant[3] to one other person at least - for the essence of the law of defamation is the protection it affords to the individual's reputation; and this cannot be affected if the plaintiff alone is the recipient of the defamatory words.[4]

In some instances, however, publication is presumed - for example, where the defamatory matter is contained in a newspaper issued for general circulation or in a broadcast transmitted to the general

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1. Duncan & Neill, op.cit., p. 18. See also the description in Adedoyin's case, supra, at 13, as to the procedure to be followed where the plaintiff seeks to rely upon an innuendo meaning - and the requirement that he provide particulars of the special circumstances in question, in terms of Order 19, Rule 6(2) of the Rules of the Supreme Court (Annual Practice) and Order 32 Rule 16 of the High Court (Civil Procedure) Rules.

2. See p. 617.

3. If the plaintiff himself is responsible for publication, his claim cannot succeed. Thus, in Okotcha v Olumese, [1967] F.N.L.R. 174, the plaintiff had requested a character certificate to support his application for a visa to visit the United States. The defendant, who was an official in the Central C.I.D. in Lagos, sent the plaintiff a certificate headed "To whom it may concern" which stated that the plaintiff had twice been convicted for offences involving dishonesty. This was erroneous. The plaintiff showed the certificate to a third party and, when he instituted a claim for damages for defamation, it was held that he himself had been responsible for publication of the libel to a third party - and hence that his action could not succeed.

4. See Duncan & Neill, op.cit., p. 36, Callender Smith, op.cit., pp. 11-13; and Nylander, op.cit., p.23.

public.[1] One caveat to this rule should, however, be noted. If the plaintiff seeks to rely on an innuendo meaning, he must prove that the special circumstances which support that meaning were known at the time to at least some of the recipients of the communication.[2]

'Every person who takes part in the publication of defamatory matter is prima facie liable in respect of that publication.'[3] This rule is an important part of the significance of the laws of defamation for those involved in the media. It means, (in the case of newspapers, for example) that not only the writer of a particular article but also the proprietors, editors and printers of the newspaper and those involved in its distribution, including news agents and street vendors, may be held liable in damages if the words in question are libellous.[4]

It should also be noted that '[e]ach communication of defamatory matter to a publishee is in law a separate publication,[5] and, in theory, would constitute an additional cause of action. In practice, however, instead of the plaintiff bringing distinct actions for every issue of a newspaper sold (for example), the 'number of copies is treated

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1. Publication is also presumed - by way of further example - when a libel is written on a postcard sent through the post, or is transmitted by telegram, but the presumption can be rebutted by proof that it was never in fact read by a single person. Such proof would clearly be difficult to provide in practice. See Philip Lewis et al (ed) Gatley on Libel and Slander, 8th ed., London, 1981, p 105.

2. Duncan & Neill, op.cit.,pp. 36 and 38. In some instances, knowledge of the special circumstances in question may also be inferred, as pointed out by the authors. This might arise where the newspaper containing the article had a large circulation and 'the special facts were widely known among persons who were likely to read the article'.

3. Duncan & Neill, ibid., p.41.

4. Ibid. As they point out, even the newsagent who sells a newspaper containing defamatory material may be held liable - subject, however, to the defence of innocent dissemination, discussed below at p. 524 et seq.

5. Ibid., p. 38.

as relevant [rather] to the issue of damages'.[1]

## 6.6. The Defences Available

The defences available to a claim for alleged defamation fall under the following main heads:

1. failure by the plaintiff to make out a *prima facie* cause of action;
2. justification, or truth;
3. fair comment;
4. absolute privilege;
5. qualified privilege;
6. unintentional defamation;
7. apology and payment into court;
8. leave and licence or *volenti non fit injuria*;
9. innocent dissemination.[2]

### 6.6.1. The plaintiff's failure to establish a prima facie cause of action

The plaintiff's action cannot, of course, succeed if he fails to establish any one of the three essential ingredients of his claim, as identified above. Hence, the defendant may contest the matter on the basis that the plaintiff has not shown that the words in question refer to him, or that they are defamatory in meaning, or that they were published by the defendant.

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1. *Ibid.*

2. Duncan & Neill, *op.cit.*, p. 53. See also Callender Smith, *op.cit.*, p. 16 and Nylander, *op.cit.*, pp. 25-33.

One of the few Nigerian decisions in which the defence of non-publication (by at least one of the defendants) has been relied upon is Awolowo v West African Pilot Ltd and another.[1] Two articles critical of the plaintiff and published in the West African Pilot were signed by the second defendant. At the trial of the action, the second defendant (insofar as the claim related to him) put the plaintiff to the strictest proof of all the ingredients of a prima facie case, including the element of publication. The first defendant admitted that the article had been written by the second; and there was also evidence that a photograph of the second defendant had been published in conjunction with the articles. The court held that this was sufficient evidence of publication by the second defendant to shift the burden of rebuttal on to him. The court pointed out that the standard of proof in civil proceedings is on the 'balance of probabilities' - not 'beyond reasonable doubt' (as in a criminal trial). Moreover, since the proceedings were civil rather than criminal, no account need be taken of the special rules surrounding 'accomplice' evidence.

### 6.6.2. Justification or truth

The original term for this defence was the Latin word 'veritas'[2] and it has been suggested (by the Faulks Committee in the United Kingdom) that the defence should be re-named 'truth', as the word 'justification' has misleading connotations.[3] The basis of the rule that truth is a defence to an action for defamation has been described as follows:

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1. [1962] W.N.L.R. 29.
2. Callender Smith, op.cit., p.22.
3. Cmnd 5909, 1975, para 144, (cited by Duncan & Neill, op.cit., p.54).

> 'The law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess'. 1

Since the law presumed defamatory words to be false,[2] the onus of proving their truth lies upon the defendant. To discharge this burden, he must show the truth of the essence or 'sting' of the libel - in both its natural and innuendo meaning, if any. The case of Adedoyin v Nigerian National Press Ltd and anor,[3] discussed above, may serve to illustrate the point.

The defences raised were justification (and fair comment, described below), so that the truth of the allegations against the plaintiff was a crucial issue. The court pointed out, however, that it was 'not sufficient to prove that the plaintiff was not present when his houses were searched'.[4] On the contrary,'[w]hat ha[s] to be justified [is ]that the plaintiff went into hiding from the police and that he was involved in the illegal importation of arms and ammunition, for these constituted the pith and marrow of the libel'.[5]

Where the defamatory words are severable into two or more distinct charges against the plaintiff and the defendant is able to show the truth of only portion of these, the common law rule is that he remains liable in damages for the remainder.[6] The difficulty with this is that '[t]he plaintiff [will] succeed in such a case if the defendant fail[s] to justify some minor charges even though he ha[s] proved

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1. McPherson v Daniels, (1829) 10 B & C. 263 at 272, per Littledale, J. (cited by Duncan & Neill, op.cit., p. 54).

2. See Duncan & Neill, ibid.,p.55. To this extent, defamation may be considered a tort of 'strict liability'. The heavy burden this places on the defendant is further discussed at p. 560 et seq.

3. [1964] 2 All N.L.R. 9.

4. Ibid.,at 14.

5. Ibid.

6. Duncan & Neill, supra ., p.56.

the truth of the others'.[1] The common law rule has accordingly been modified in some parts of Nigeria (but not in the northern states[2]) by legislative provisions[3] modelled on section 5 of the United Kingdom Defamation Act of 1952.[4] S 7 of the Defamation Law 1961 states:

> 'In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges'. 5

Unfortunately, however, there are a number of difficulties attendant upon this provision. Firstly, it is limited in ambit to those instances where defamatory words are indeed severable into different charges. More seriously, it is open to abuse in that 'a plaintiff can [choose to] bring an action in respect of one untrue defamatory statement which he has selected from a number of others which were true'.[6] - with the result that the statutory provision will not avail

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1. Nylander, op.cit., p. 25, relying upon the authority of Goodburne v. Bowman, (1833) 9 Bing 667.

2. The northern states of Nigeria cover an enormous area and hold the bulk of the population. Accordingly, this lacuna in the law of these states is potentially highly significant. The difference in the civil law of defamation as between the three former Regions of Nigeria has previously been discussed, in the section on the Sources of the Civil Law of Defamation, at p. 463 above.

3. s 8 Defamation Law (eastern states) Cap 33; s 11 Defamation Law (western states) Cap 32; and s 7 Defamation Law 1961.

4. 15 & 16 Geo 6 & 1 Eliz. 2 c. 66. Section 5 of this statute is the exact counterpart of the Nigerian provisons set out in the text below.

5. This provision has identical counterparts in the eastern and western state laws identified at note 3 above.

6. Callender Smith, op.cit., p. 21, citing the criticism (by the United Kingdom Press Council) of section 5 of the Defamation Act, 1952.

the defendant. The decision (of the House of Lords) in Speidel v Plato Films Ltd.[1] graphically demonstrates the danger.

> '[T]he plaintiff had been Supreme Commander of the Axis Forces in Central Europe. The defendants made a film about him which connected him with the murder of King Alexander of Yugoslavia and Monsieur Barthou in 1934 and indicated that he betrayed Field Marshal Rommel in June 1944. These were the points the plaintiff sued on. The bulk of the film, however, dealt with his war crimes and atrocities, and the plaintiff did not deny these, or the truth of them, in his statement of claim. The House of Lords held that the defendants could not introduce this evidence either in defence or in mitigation of damages because he had not sued on this broad ground'. 2

The Faulks Committee has accordingly recommended that the United Kingdom provision be amended inter alia to enable 'a defendant [to] rely on the whole of [a] publication in answer to a claim by a plaintiff relating to only a part of it'.[3] Such improvement would seen well advisable in Nigeria too.

Further aspects of the defence are fully described by Duncan & Neill[4] but lie outside the scope of this study. Suffice it, therefore, for present purposes, to note merely the following additional points:

(a) proof by the defendant that he based his words upon rumours or hearsay reported to him and which he honestly believed will not be sufficient to discharge the burden;[5]

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1. [1961] A.C. 1090 (H.L.(E)).
2. Callender Smith, op.cit., p.21.
3. Ibid; and see also the Faulks Report, Cmnd. 5909, 1975, para. 134.
4. op.cit., Chapter 11, especially at pp. 57-60.
5. Lewis v Daily Telegraph Ltd., [1964] AC 234 at 283, per Lord Devlin, cited by Duncan & Neill, op.cit., p. 60.

(b) 'an unsuccessful attempt to justify a defamatory statement will aggravate damages'[1] - on the basis, in essence, that "insult" has been added to "injury". This perhaps accounts for the fact that very little reliance has been placed on 'justification' in Nigerian cases by contrast with other defences - notably that of fair comment.

6.6.3. Fair comment on a matter of public interest.

There are four important aspects to this defence.

i. The comment[2] must be 'fair'

This word is misleading, for it suggests that the test to be satisfied is one of objective reasonableness. This is not, however, so; and all that need be shown is that the comment is 'honest'. Thus, the question is not 'Is this comment fair?' but rather 'Could any man - however prejudiced or obstinate in his views - honestly express that opinion on the proved facts?'[3] The law thus recognises that, in the interests of freedom of speech, considerable latitude must be allowed to the expression of opinion on matters of general concern.[4]

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1. Nylander, op.cit., p. 26, citing the authority of Ezekwe v Otomewo and others [1957] W.N.L.R. 130, where Onyeama, Ag, J., held 'that the conduct of the defendants in trying unsuccessfully to justify the libel and in making "monstrous imputations of gross professional misconduct against the plaintiff in a crowded court" aggravated damages'. See McNeil & Rains, op.cit., p. 335.

2. The meaning of 'comment' is discussed below.

3. See Duncan & Neill, op.cit., p. 68 and the passage cited by them from the judgment of Lord Hewart C.J. in Stopes v Sutherland, on p. 69. See also Callender Smith, op.cit., p. 46.

4. See the summing up to the jury of Diplock, J. in Silkin v Beaverbrook Newspapers Ltd., [1958] 2 All E.R. 516.

An important ramification of the requirement that the comment be honest is that this defence cannot avail the defendant who is actuated by 'express malice', as further discussed at p 533 below.[1]

(ii) The words in issue must constitute a 'comment' rather than a statement of fact.

The distinction is well illustrated by the juxtaposition of two examples in the judgment of Lord Porter in Kemsley v Foot:

> 'If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful", this is merely an expression of his opinion, his comment on the plaintiff's conduct.... But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth'. 2

In practice, inevitably, there are many "grey" instances when this test is hard to apply. It would seem, however, that 'comment' includes within its ambit deductions or inferences of fact drawn by the commentator[3] and is not therefore limited to opinion or judgment, stricto sensu.

The Nigerian case of A.W. Ibe and Co Ltd v The Reveille Printing and

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1. Where a man is motivated by malice, it is difficult to believe that his opinion can be 'honest'. This possibility must however be acknowledged. If he is actuated by the desire to injure the plaintiff, however, it is most unlikely that he can satisfy the test of having acted in the 'public interest'. Hence, as elaborated below, express malice does not so much negative the defence as preclude the defendant from establishing its elements.

2. [1952] A.C. 345 at 356 [cited by Duncan & Neill, op.cit., p.64].

3. See Duncan & Neill, ibid., p. 66 and the dictum of Cussen, J. in Clarke v Norton [1910] V.L.R. 494 and 449 [cited by Duncan and Neil, ibid., p. 67]

Publishing Co.,[1] provides some illustration of what constitutes 'comment'. The defendants published an article in a newspaper (called the Renaissance) alleging that 'the plaintiffs, a firm of contractors, were insolvent and inefficient in the construction of a layout (sic) of plots and that the contract ought to have been terminated since the East Central State Government had removed the name of the plaintiffs from the register of contractors'.[2] The defence of 'fair comment' succeeded.

(iii) The comment must be based on fact

There are two important aspects to this principle.

(a) The facts on which the comment is based must either be stated 'or indicated ... with sufficient clarity to enable the [recipient] to ascertain the matter on which comment is being made'.[3] Failing this, the so-called 'comment' - as pointed out in Kemsley v Foot, above[4] - for example, 'that the plaintiff has been guilty of disgraceful conduct' must be viewed as a statement of fact, for which the only defence is justification or truth.

(b) The facts commented on must be true. At common law, this requirement is so strict that '... each [and every] fact must be 'justified [i.e. proved true] and if the defendant fails to justify one, even

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1. (1975) 5 E.C.S.L.R. 31.

2. See ibid.

3. Duncan & Neill, op.cit., p.64. See also Callender Smith, op.cit., p. 46 and Nylander, op.cit., p. 26.

4. Kemsley v Foot, ibid., at 357-8, per Lord Porter, [cited by Duncan & Neill, ibid.].

if it be comparatively unimportant, he fails in his defence'.[1] The only common law exception is where the stated facts are protected by privilege. Thus, for example, if a journalist bases honest comment on the testimony of a witness in court proceedings which is subsequently shown to be perjured, he will not thereby be precluded from successful reliance on the defence of 'fair comment'.[2]

The rigour of the common law rule has now to some extent been modified by statute. In the United Kingdom, this was effected in 1952, by s 6 of the Defamation Act.[3] Defamation legislation in some parts of Nigeria has followed this lead; and thus, except within the orthern states of the country, statute[4] - closely modelled on the United Kingdom enactment now provides:

> 'Fair Comment. - In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved'.

The following cases illustrate the ambit of the requirement that the facts commented upon be true.

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1. Kemsley v Foot, ibid., at 357-8, per Lord Porter, (cited by Duncan & Neill, ibid.).

2. See Duncan & Neill, ibid., and the passages there cited from Mangena v Wright [1909] 2 K.B. 958 and Grech v Odhams Press [1958] 2 Q.B. 275 at 295, per Jenkins, L.J.

3. 15 & 16 Geo. 6 & 7 Eliz c. 66.

4. Defamation Law, 1961, s 8; Defamation Law (eastern states) Cap.33, s. 9; Defamation Law (western states) Cap. 32, s 12.

In Bakare v Oluwide and others,[1] discussed at p.472 above, it may be recalled that the court - by virtue of a number of similarities of fact - had concluded that a newspaper article describing the life of luxury and conspicuous consumption enjoyed by the 'Man of Means' in Nigeria, did indeed refer to the plaintiff. It then turned to the defence contention that the article constituted 'fair comment on a question of public interest'; and emphasised that '[i]f the facts upon which the comment purports to be made did not exist, the defence of fair comment must fail'.[2] The 'stings' of the libel were that the person referred to:

* 'exploit[ed] the labour of dock workers with public capital'[3] - and this the court found on the evidence to be untrue;
* 'was funded by the American Central Intelligence Agency' - and this was also untrue; and
* 'corruptly pressurised men of power in politics' - which also was not true.[4]

The defence of 'fair comment' was accordingly rejected.

In African Newspapers of Nigeria Ltd. v Coker,[5] the defence of fair comment was dismissed. The underlying facts are somewhat complex and require brief elaboration. In 1966, the Federal Military Government instituted an enquiry - which became known as the Saville Tribunal - into the affairs of the Lagos City Council in which the plaintiff then held office as the City Treasurer. The Saville Report exonerated

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1. [1967] 2 All N.L.R. 324.
2. Ibid., at 332.
3. Ibid., at 333.
4. Ibid.
5. [1973] 1 N.M.L.R. 386.

the plaintiff from a specific charge of corruption levelled against him, but found that his conduct had been 'irregular' in a number of instances and would 'in the circumstances of many countries [have] merit[ed] his compulsory retirement'.[1] It recommended that his assets be further investigated and concluded that, if no greater impropriety were thus revealed, 'his undoubted talents need not be wasted, and that in a different capacity, he [might] still be permitted to use them for the benefit of his country'.[2]

The Report was made public in conjunction with a Government White Paper in which the Federal Military Government accepted the recommendation that the plaintiff's assets be further probed but emphasised that, if this was favourable, the plaintiff - although he deserved severe reprimand - should continue in his present office.[3]

An investigation into the plaintiff's assets was accordingly initiated - but was conducted in private. The consequent report exonerated the plaintiff, who was then appointed Permanent Secretary to the Lagos Finance Ministry. The defendants thereupon published two articles in the Nigerian Tribune in which, in essence, they called - on the basis of 'the findings and the reports of the enquiries set up by the Federal Military Government'[4] - for the plaintiff's removal from this office as part of a campaign to keep Nigeria free from corruption.

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1. Para (iv) of the Tribunal Report, cited at 394, ibid.

2. Ibid.

3. See The Federal Military Government's White Paper on the Report, cited at 395, ibid.

4. Nigerian Tribune, 11 February 1969, reproduced at 389, ibid.

The plaintiff claimed damages for libel and one of the defences raised was 'fair comment': in attempted substantiation of which the defendants led evidence as to the irregularities of the plaintiff's conduct as reported by the Saville Tribunal.

The court a quo rejected the defence and this was confirmed on appeal to the Supreme Court. By excluding all reference to the Government White Paper which, in the court's view, 'completely exonerated the plaintiff of corruption', the defendants had 'supress[ed] something vital to a fair comment' in that it had failed to 'present the whole truth of the matter'.[1] Furthermore, the Saville Report had found the plaintiff's conduct not corrupt - but irregular; and accordingly the Report could not provide the basis for comment that the plaintiff should be removed from office in order to keep Nigeria corruption-free. In addition, neither of the articles (which appeared to have been written in the process of a 'war of words' between newspapers of differing political orientation) could properly be considered as comments on the Saville Report at all: and hence the requirement that comment should be based on facts stated or clearly indicated had not been met.[2]

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1. Ibid., at 387.

2. The judgment of the Supreme Court, per Udoma J.S.C., is unfortunately not presented in brief summary in the fashion here set out but is dispersed over a number of different pages. It is nevertheless submitted that the above passage represents a 'fair' condensation of the points it considered important. The defence of fair comment was also rejected because the court found that the defendants had been activated by express malice. It is nevertheless submitted that the court's emphasis (as described in the text above) on the need for the defendants to show the truth of the facts commented upon is indeed part of the ratio of the decision, since the court dealt with it as one of the important questions to be decided.

In Williams and others v The West African Pilot Ltd.,[1] discussed above[2] and further at p.546 below, the plaintiffs claimed that they had been libelled by a series of cartoons alleging that they had plotted to win the 1951 elections to the (former) Western Region House of Assembly by fraud, corruption and intimidation and that - when these plans failed and the N.C.N.C. nevertheless succeeded in winning a majority of seats - had devised a final master plot to bribe N.C.N.C. members to "cross the carpet" and give the A.G. the majority required to form the government.[3] The defendants raised the plea of 'fair comment'; but in the particulars lodged by them in support of this defence, all they stated was that the N.C.N.C. and A.G. were both major political parties; that they had fought each other in the 1951 elections 'the proceedings of which were and still are of great public concern'; that the loyalty of Members of the Western House of Assembly and 'the transfer of their allegiances from one political party to another' were 'questions constantly canvassed by the press'; and that '[t]he methods which any political party adopts ... with a view of (sic) ... gaining power constitute a subject of public discussion and disputed opinion'.[4] At the trial of the action, the defendants' counsel referred simply to 'the political turmoil in the East and West'[5] prevailing at the time.

The court rejected the defence of fair comment on the basis that '[n]o

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1. [1961] W.N.L.R. 330.

2. See the section on 'reference to the plaintiff' at p. 470 above.

3. See the section on the History of Nigeria at p 82 above for further information as to the 1951 election: and as to the two political parties here concerned. The significance of the case for freedom of expression is analysed at 548 below.

4. Williams and others v The West african Pilot Ltd., supra, at 335.

5. Ibid., at 337.

effort ha[d] been made to show to the court that the plaintiffs or any of them employed thugs and/or ex-convicts for mass impersonation and fraud during the 1951 Regional elections',[1] as the cartoons alleged. Moreover, 'the statement that the N.C.N.C. [had] won a majority in the West [was] not substantiated [and, in the court's view] was patently false'[2] - for the court could not believe that the N.C.N.C. (in these circumstances) would not have challenged the formation of government by the A.G. or that the Lieutenant-Governor (of the Region) would have 'violated the principles of a two-party parliamentary democracy'[3] by asking the party with minority support in the legislature to form the government. In addition, (though this is a point which bears upon (ii) above rather than the present focus of inquiry), the court was not satisfied that these remarks were 'comments' at all but rather allegations of fact[4] (for which the only defence is 'justification'[5]).

(iv) The matter commented upon must be 'of public interest'.

This is the fourth important aspect of the defence[6] and is well illustrated (though perhaps inadvertently) by the particulars in the Williams case, described above, which - if not sufficient to substantiate the allegations made against the plaintiffs - certainly emphasised that the issue was one of the general public concern.

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1. Ibid., 342.
2. Ibid.
3. Ibid.
4. Ibid.
5. See the discussion in the text at p. 492.
6. Duncan & Neill, op.cit., p. 62; Callender Smith, op.cit., p. 46 and Nylander, op.cit., p.26.

The abuse of the electoral process is unquestionably a matter 'of public interest'. It is submitted, however, that the range of public interest extends far beyond such issues; and that the appropriate test is whether the 'matter is such as to affect people at large'[1]. Accordingly, 'in appropriate circumstances the treatment of, for example, any tenant by his landlord or any employee by his employer or any patient by his doctor is capable of satisfying the test ... of public interest'[2].

A further essential point to note regarding the defence is that it is defeated by evidence that the publication was actuated by express malice on the part of the defendant.. It is not, however, proposed to canvass this principle further at this stage but to deal with it instead in the context of a general discussion of the relevance of the defendant's intention or state of mind, at p 532 below.

It remains to consider the effect of what is commonly known as the 'rolled-up plea'. Its usual form is as follows:

> '"In so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest"'.
> [3]

Although this wording may suggest that the plea is one of justification

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1. London Artists Ltd v Littler, [1969] 2 Q.B. 375 at 391, per Lord Denning, M.R. See also the list of matters of public interest provided by Kodilinye, op cit, p 157.

2. Duncan & Neill, op cit, p 63.

3. See Kodilinye, supra, p 159.

and fair comment "rolled-up" together, the matter was clarified in Sutherland v Stopes[1] and 'it is now clear, as Adefarasin J. emphasised in Saraki v Soleye[2], that "it raises only one defence - the defence of fair comment"'.[3] Accordingly, if a defendant wishes to rely on the defence of justification as well, he must expressly plead this in addition.

### 6.6.4. Absolute privilege

The word 'absolute' signifies that this kind of privilege provides a complete defence to a claim for defamation, irrespective of the defendant's motive in publication, however nefarious. It thus differs significantly from 'qualified' privilege, which is defeasible by evidence of express malice, as further discussed below.

The underlying rationale for this complete defence lies in the recognition that, in certain circumstances, the freedom to speak or write frankly and openly (without fear of liability for libel) is more important than the protection of the reputation in society of individuals who may be affected thereby. In a nutshell, the over-riding public interest is thus seen - in these instances - as the encouragement of total candour.

Absolute privilege thus attaches to statements of the following kinds:

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1. [1925] A.C. 47.
2. (1972) 2 (Part III) U.L.L.R. 271 at 281.
3. Kodilinye, supra, p. 160.

(i) statements made in the course[1] of proceedings before a court or other tribunal exercising a judicial function[2] - whether by the presiding officer, the parties, their counsel or witnesses; provided, however, that their content has some relevance to the matter in issue;[3]

(ii) statements made in the course[4] of parliamentary proceedings in Federal and State Houses of Assembly as well as in reports or other papers published at their order;

(iii) statements made by one officer of State to another in the course of duty;[5]

(iv) reports by an officer in the armed forces to his superior.[6]

In addition, it appears (though the matter is not entirely free from doubt) that absolute privilege is also enjoyed by communications

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1. This is widely interpreted and includes, for example, writs, pleadings, affidavits and other documents in the proceedings, including proofs of evidence. See Lincoln v Daniels, [1962] 1 Q.B. 237 at 257, per Devlin L.J., cited in the course of a detailed discussion by Duncan & Neill, op.cit., p.91.

2. For a full discussion of the criteria which determine whether a tribunal is protected by absolute privilege, see Duncan & Neill, ibid., pp. 86-91.

3. Seaman v Netherclift (1876) 2 CPD 53. Relevance must, however, be widely interpreted; and in the same case Amphlett, JA. said, at 61: 'I can see many reasons why a witness should be absolutely protected for anything he said in the witness box'.

4. The privilege extends to witnesses before committees, for example, as well. See Duncan & Neill, ibid., p. 82.

5. Nylander, op.cit., p.28.

6. Duncan & Neill, supra, p. 93-95 and Nylander, ibid.

between solicitor (and presumably counsel) and client[1] and by fair and accurate reports of judicial proceedings in Nigeria if published contemporareously.[2] The latter principle reflects a statutory modification (it would seem)[3] of the common law rule that such reports enjoyed only qualified privilege. Nigerian legislation in this regard - which applies only within the southern states - is based upon the Law of Libel Amendment Act of 1888.[4] Thus, the Defamation Law, 1961, of Lagos State (and the Defamation Law of the eastern states)[5] provides that:

> 'A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority... shall, if published contemporaneously with such proceedings, be privileged:
> Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter'. 6

Further provisions,[7] based upon the belated recognition accorded to broadcasting services in the United Kingdom by the Defamation Act of 1952, extend the privilege to such reports when broadcast 'by means of wireless telegraphy as part of any programme or service provided by

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1. See Duncan & Neill, op.cit., p.81 and Nylander, op.cit., p.28. Since this privilege has no direct relevance for freedom of expression, further discussion of it falls outside the ambit of this study.

2. See Duncan & Neill, ibid., and Nylander, ibid. The meaning of these terms is discussed further in due course.

3. There is some doubt as to whether the statutes have changed the common law, as further explained.

4. 51 & 52 Vict. c. 64.

5. s 11 Defamation Law (eastern states), Cap 33 is virtually identical, but the broadly equivalent provision (s 15) of the Defamation Law (western states), Cap 32 contains important differences, as further explained below.

6. s 10, Defamation Law 1961 (Lagos State).

7. See s. 11, ibid., and the equivalent provisions (in ss. 12 and 17 respectively) of the Defamation Laws of the eastern and western states, supra.

means of a broadcasting station within Nigeria ... providing broadcasting services [under licence] for general reception'.[1]

Controversy as to the ambit of the privilege stems from the failure of the legislation to specify whether it is absolute or not. It is interesting to note from the debates surrounding the adoption of the original provision in 1888 that the word 'absolute' (originally included) was deliberately struck out,[2] suggesting that Parliament intended the privilege to be qualified only. This interpretation, however, would render the statutory provision nugatory for, at common law, such reports clearly enjoyed qualified privilege, whether or not published contemporaneously.[3] In the United Kingdom, however, commentators appear confident that the privilege is indeed absolute;[4] and in two English decisions,[5] is is assumed (admittedly without argument on the matter), that this is indeed the case. In Nigeria, it is interesting to note that one of the Defamation Laws (that applicable in the western states) does expressly declare - in its equivalent provision[6] - that the privilege accorded to such contemporaneous reports is "absolute".

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1. Ibid.

2. Hansard, June 6, 1888, cited by Callender Smith, op.cit., p.25.

3. See Callender Smith, op.cit., p. 26, Duncan & Neill, op.cit., p.98.

4. Callender Smith, ibid., p.25. Cf, however, the Faulks Report, para 242.

5. Farmer v Hyde, [1937] 1 Q.B. 728 at 740, 744; McCarey v Associated Newspapers [1964] 1. W.L.R. 855 [cited by Callender Smith, ibid., and by Nylander, op.cit., p.28].

6. s. 15, Defamation Law (western states). This section differs also from the 'Lagos' and 'eastern states' legislation in that the proviso extends not only to 'blasphemous or indecent matter' but also to '... any matter the publication of which is prohibited by law'.

The inclusion of this word in the Defamation Law of the western states is, of course, subject to alternative interpretation. Either the word was included ex abundante cautela - even though not strictly necessary to render the privilege absolute - or it was indeed considered essential to achieve this result. No guidance in this regard has, unfortunately, yet been provided by the courts. However, the question as to which is the correct interpretation is of considerably more than academic interest: for the practical significance of the distinction between absolute and qualified privilege lies in the fact that the former, unlike the latter, is indefeasible by evidence of express malice: and this may have considerable importance in practice.[1]

As regards the two substantive requirements - that the reports be 'fair and accurate' and that they be published 'contemporaneously' - it is the former which appears to have arisen more often before the courts; and which, accordingly, seems to warrant further consideration. Since this requirement applies also to reports for which qualified privilege may be claimed at common law, it is proposed to postpone such consideration pending brief examination of the general categories of qualified privilege.[2]

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1. The significance of express malice is described further below, at p. 533. It seems, however, that (as yet) there has been no reported instance of a media report of judicial proceedings being activated by express malice. The possibility of such malice was considered (by implication) but rejected in the case of Bare and others v Odukomaiya and another [1973] 5 C.C.H.C.J. 54. Here, proceedings for defamation were brought following the publication in the Daily Times of a report of criminal proceedings in a magistrate's court. The claim failed as the court found that the report was fair and accurate and that there was no evidence of malice underlying its publication.

2. The meaning of 'contemporaneity' is further discussed at p. 1022 in the context of the law of contempt.

6.6.5. Qualified privilege

Qualified privilege attaches to statements of the following kinds:

(i) Statements made in pursuance of a duty (legal, moral or social) to a person with a corresponding interest or duty to receive them.[1] Whilst legal duties are ipso facto relatively clearly defined, it is extremely difficult to lay down hard and fast rules as to the circumstances that will generate a moral or social duty. Some guidance is provided by the judgment of Lindley, L.J. in Stuart v Bell,[2] to the effect that '...moral or social duty ... mean[s] a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal'.[3] Further illustrations are provided by the following Nigerian cases:

In Awolowo v West African Pilot Ltd. and anor,[4] the defendants - who had published an article found to be defamatory of the plaintiff - raised the defence that it had been published in response to the plaintiff's prior attack on Dr Azikiwe ('What I think of Zik') and that 'it was the duty of any Nigerian to defend [Dr Azikiwe]'[5] - who was, according to the defendants, precluded by his office[6] from coming to his own defence. This contention was rejected by the court, which held that there was nothing to stop Dr Azikiwe from speaking out in his own

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1. Duncan & Neill, op.cit., p. 98, Callender Smith, op.cit., pp. 35-36; Nylander, op.cit., p. 28.

2. [1891] 2 Q.B. 341 (cited by Duncan & Neill, ibid., p. 101).

3. Ibid., at 350.

4. [1962] W.N.L.R. 29.

5. Ibid.

6. Dr. Azikiwe was then Governor-General of Nigeria.

defence and that there was no duty cognisable by the law resting upon the defendants to do on his behalf.

In similar vein, in the case of Ohanbamu v Midwest Newspaper Corp and anor,[1] the defendants' plea that their article criticising the plaintiff had been published - pursuant to social duty - to counteract the latter's prior accusations against the Federal Military Government and to boost public morale - was rejected by the court. It found that '[t]he words were not necessary in pursuance of any social or moral duty the defendants may have thought they had a public duty or interest to publish'.[2]

By contrast, in Ajala v Showunmi,[3] the defendant's letter to the Chief of Staff of the Nigerian Army and other senior Army officers - complaining about the conduct of the plaintiff (a major in the army) was found to enjoy qualified privilege.[4] Likewise, in Ayoola v Olajure and another[5], the court confirmed that privilege of this nature attaches to a reference (in this instance, denigrating the plaintiff's competence as a secretary) supplied by a past employer to a prospective one.[6]

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1. [1974] 6 C.C.H.C.J. 763.

2. Ibid., at 782.

3. [1977] 1 C.C.H.C.J. 25.

4. In the end, however, the defence of qualified privilege was defeated by evidence of express malice. The plaintiff was alleged to have demolished the defendant's wall whilst brandishing a revolver. The court found this unsubstantiated and concluded that the defendant had been actuated by express malice. There was, apparently, a long-standing feud between the parties.

5. [1977] 3 C.C.H.C.J. 315.

6. See also Aruna v Taylor, [1977] 1 C.C.H.C.J. 15.

(ii) Statements made for the protection or furtherance of a common interest.[1]

Nigerian illustrations include the following cases:

In Saraki v Soleye,[2] both parties were medical practitioners and the defendant was also the Permanent Secretary of the Ministry of Health and Social Welfare. He wrote a hard-hitting letter to the plaintiff, accusing the latter, inter alia, of employing unqualified staff, and supplying unnecessary injections for monetary gain. He sent a copy of the letter to the Nigerian Medical Council. The plaintiff's claim for damages for libel was rejected by the court, as both the defendant and the Council had a legitimate interest in the subject-matter of the letter.

Likewise, in Okusanya v West African Automobile and Engineering Co. Ltd.,[3] the defendants' letter to the Permanent Secretary of the Ministry of Trade and Industry (responsible, inter alia, for the conduct of trade exhibitions) complaining of the plaintiff's failure to erect a stand at such an exhibition - as contracted for - was protected by qualified privilege, so that the plaintiff's claim for damages for defamation was dismissed.

(iii) Fair and accurate reports of judicial proceedings, however

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1. Note that there are two aspects to 'common interest'. The interest may be a general one, shared by a number of people, including the parties; or it may be limited in ambit to the parties alone. The crucial element is that there should be a legitimate interest in imparting the information and corresponding interest in receiving it. See Duncan & Neill, op.cit., p. 98, Callender Smith, op.cit.,p.36.

2. [1972] 2 (Part III) U.I.L.R. 271.

3. [1974] 3 C.C.H.C.J. 365.

published,[1] and whether or not contemporaneous.[2]

The requirement that such reports be 'fair and accurate' is illustrated by the following[3] Nigerian decisions:

In Omo-Osagie v Okutubo and another,[4] the plaintiff claimed that she had been libelled by an article in the Lagos Weekend stating: 'Chief Justice tells a teacher "You are a bad woman"'. The defence raised was that the words were a fair and accurate report of matrimonial proceedings between the plaintiff and her husband. It appeared that the trial judge had made various adverse comments regarding the plaintiff's conduct (both as a witness in the proceedings and as a spouse)[5] but that he had never in fact used the words 'You are a bad woman'. The court held that

> 'Although a newspaper has a right to publish either a verbatim or an abridged and condensed report of what transpired in a court of justice, such publication must be done fairly and honourably so as to convey a just impression of what has transpired'. 6

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1. This contrasts with reports protected by statutory privilege, as explained below at p. 511.

2. Only contemporaneous reports may enjoy absolute privilege, as discussed above at p. 504.

3. See also Bare and others v Odukamaiya and anor, [1973] 5 C.C.H.C.J. 54, where a newspaper report was found to satisfy this requirement; and Bandale v Daily Times of Nigeria Ltd., [1974] 6 C.C.H.C.J. 755, where the claim of 'privilege' was rejected because of inaccuracies in the newspaper's report of proceedings against the plaintiff in a magistrate's court.

4. [1969] 2 All N.L.R. 175.

5. He had, in fact, described her as 'untruthful ... a woman of no mean temper ... [with] a nagging and ill-tempered nature'. See ibid., at 178.

6. Ibid., at 179.

The report in issue failed to satisfy this test, and the defence of privilege[1] accordingly failed.

The reasons for according reports satisfying this requirement the protection of qualified privilege 'include the fact that judicial proceedings are open to the public, that the public is concerned with the administration of justice and that it is better for the parties involved that a fair and accurate report should be published than that rumours should circulate'.[2] Accordingly, the privilege does not attach to pleadings or other court documents, which are not read out in open court. The point is well illustrated by Lardner v Sketch Publishing Co Ltd.,[3] which arose out of the publication, by the defendants, of an article in the Daily Sketch headed 'Lawyer sued over parcel of land'. The newspaper report was based upon averments contained in the statement of claim in the proceedings, and the defendants accordingly claimed the protection of qualified privilege. The defence was dismissed, however, as the statement of claim had not been read out in the course of the proceedings. The court referred to a number of English authorities on this question and concluded:

> 'The defence of qualified privilege in relation to the reporting of judicial proceedings does not apply to the publication of the contents of documents not brought up in open court'. 4

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1. The report had been published contemporaneously, so the defences of both absolute and qualified privilege were raised. Since 'fairness' and 'accuracy' are requirements common to both, neither could avail the defendant.

2. Duncan & Neill, op.cit., p.109.

3. (1979) 3 L.R.N. 276.

4. Ibid.

(iv) Fair and accurate reports of Parliamentary proceedings.[1]

In Enahoro v Associated Newspapers of Nigeria Ltd and anor,[2] the plaintiff claimed damages for an alleged libel contained in two successive issues of the Southern Nigeria Defender. The gist of the articles in question[3] was that the plaintiff, the Leader of the Western House of Assembly, had improperly intervened in cutting short a question raised in the House regarding the alleged suspension of a Customary Court presided over by his father. Comparison of the newspaper articles with the Hansard report of the proceedings showed, however, that they were 'grossly inaccurate'.[4] The defence of qualified privilege accordingly failed.

(v) Certain reports published in newspapers[5] or by broadcasting[6]

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1. Duncan & Neill, op.cit., p. 98, Callender Smith, op.cit., pp.33-34. Nylander, op.cit., p. 29.

2. [1960] W.N.L.R. 219.

3. This was insofar as they related to the plaintiff. Considerable criticism was also directed at the obstructive attitude displayed by Chief Rotimi Williams.

4. Enahoro v Associated Newspapers of Nigeria Ltd and anor, supra.

5. For the purpose of these provisions, "newspaper" is defined as 'any paper containing public news or observations thereon, or consisting wholly or mainly of advertisement, which is printed for sale and is published in Nigeria either periodically or in parts or numbers at intervals not exceeding thirty-six days'. s. 9(5) Defamation Law 1961 (Lagos State): cf s. 2(2) Defamation Law (western states) Cap 32 which omits reference to such interval.

6. This, in essence, means broadcasting by 'wireless telegraphy' from a broadcasting station providing services for general reception, under licence granted by the Minister of Communications. See s. 11(2) Defamation Law, 1961 (Lagos State); s. 17 Defamation Law (western states) Cap 32; s. 12, Defamation Law (eastern states) Cap. 33.

which enjoy "statutory" privilege.

Following the lead of the United Kingdom Defamation Act 1952,[1] Nigerian defamation legislation[2] confers qualified privilege on certain reports (described below) subject, however, to the satisfaction of two overriding conditions:

(a) publication must not be prohibited by law;[3] and

(b) the matter in question must be of public concern and its publication for the public benefit.[4]

In addition, one category of such reports,[5] is protected only if a further condition - as to 'explanation or contradiction' - is met. In other words, as regards this category of report, the statutory privilege will not avail the defendant if he is requested by the plaintiff[6] to publish or broadcast a reasonable explanation or contradiction of the original report and refuses or neglects to do so (or does so in an inadequate or unreasonable manner).[7]

The two categories of statements enjoying statutory qualified privilege are as follows:

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1. s 7, Defamation Act, 1952, 15 & 16 Geo. 6 & Eliz 2 c. 66.

2. s.9, Defamation Law 1961 (Lagos State); s. 12, Defamation Law (eastern states) Cap. 33; s. 17, Defamation Law (western states) Cap. 32.

3. See Duncan & Neill, op.cit., p. 103, discussing the equivalent United Kingdom section.

4. Both elements must be shown, and the onus lies on the defendant to do so. See Duncan & Neill, ibid., p.104.

5. See below, p. 512.

6. The plaintiff should include with his request a draft of the statement he desires. See, Duncan & Neill, p. 104, para 13.14.

7. Duncan & Neill, ibid.

STATEMENT PRIVILEGED WITHOUT EXPLANATION OR CONTRADICTION

3. A fair and accurate report of any proceedings in public of the legislature of any part of Her Majesty's dominions outside Nigeria.

4. A fair and accurate report of any proceedings in public of an international organisation of which Nigeria or Her Majesty's Government in Nigeria is a member, or of any international conference to which that Government sends a representative.

5. A fair and accurate report of any proceedings in public of an international court.

6. A fair and accurate report of any proceedings before a court exercising jurisdiction throughout any part of Her Majesty's dominions outside Nigeria, or of any proceedings before a court-martial held outside Nigeria under the Royal Nigerian Army Act, 1960, or the Royal Nigerian Navy Act, 1960.

7. A fair and accurate report of any proceedings in public of a body or person appointed to hold a public inquiry by the Government or legislature of any part of Her Majesty's dominions outside Nigeria.

8. A fair and accurate copy of or extract from any register kept in pursuance of any enactment which is open to inspection by the public, or of any other document which is required by the law of any part of the Federation of Nigeria to be open to inspection by the public.

9. A notice or advertisement published by or on the authority of any court within Nigeria or any judge or officer of such a court.

[1]

STATEMENT PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

10. A fair and accurate report of the findings or decision of any of the following associations, or of any committee or governing body thereof, that is to say:-

(a) an association formed in Nigeria for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning and empowered by its constitution to exercise control over or adjudicate . . . . . .

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1. Part II of the Schedule to the Defamation Law 1961 (Lagos State). For reference to equivalent provisions in the eastern and western Defamation Laws, see overleaf.

upon matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication;

(b) an association formed in Nigeria for the purpose of promoting or safeguarding the interest of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with trade, business, industry or profession, or the actions or conduct of those persons;

(c) an association formed in Nigeria for the purpose of promoting or safeguarding the interests of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudication upon persons connected with or taking part in the game, sports or pastime,

being a finding or decision relating to a person who is a member of or is subject by virtue of any contract to the control of the association.

11. A fair and accurate report of the proceedings at any public meeting held in Nigeria, that is to say, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.

12. A fair and accurate report of the proceedings at any meeting or sitting in any part of Nigeria of:

(a) any local authority or committee of a local authority or authorities;
(b) any magistrate or judge of a customary court acting otherwise than as a court exercising judicial authority;
(c) any commission, tribunal, committee or person appointed for the purposes of any inquiry by law, by the Governor-General, or by a Minister of the Crown;
(d) any person appointed by a local authority to hold a local inquiry in pursuance of any enactment;
(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any enactment,

not being a meeting or sitting admission to which is denied representatives of newspapers and other members of the public.

> 13. A fair and accurate report of the proceedings at a general meeting of any company, association registered or certified by or under any enactment or incorporated by Royal Charter, not being a private company within the meaning of the Companies Ordinance. [1]

It should be emphasised that the statutory protection extends only to reports in newspapers (as defined)[2] or broadcast for general reception. Accordingly, to name but two examples, it does not protect speakers at public meetings (who probably, however, enjoy qualified privilege under common law in any event),[3] nor does it extend to writers of books or contributors to journals which fall outside the statutory definition of newspapers. In addition, by no means all foreign legislatures and courts are brought within the ambit of the statutory provision, and reports of the proceedings of these accordingly remain subject to common law rules.[4]

The operation of this 'statutory privilege' is illustrated by Akurefe and others v Sketch Publishing Co. Ltd. and anor.[5] The defendants had published an article in the Daily Sketch stating that the plaintiffs, the proprietors of a school in Benin City, had been handed over to the police by the Commissioner of Education for attempting to bribe the Acting Principal Inspector of Education. The plaintiffs claimed damages for libel and the defendants raised three

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1. Part III of the Schedule to the Defamation Law 1961 (Lagos State) Equivalent provisions are contained in Parts I and II of the Schedule to the Defamation Law (eastern states) Cap 33 and in Parts I and II of Defamation Law (western states) Cap 32.

2. See p. 510.

3. See Horrocks v Lowe [1975] A.C. 135.

4. Such reports are protected by qualified privilege under common law in certain circumstances: See Webb v Times Publishing Co. [1960] 2 Q.B. 535.

5. [1971] U.I.L.R. 13.

defences: fair comment, justification, and statutory privilege. The defence of fair comment could not succeed because the article had been presented in the form of allegations of fact, rather than statements of opinion. Nor could the defence of justification avail the defendants, for they had not succeeded in proving that the allegations were indeed true. The plea of 'statutory privilege' did, however, succeed. The defendants led evidence that the 'publication was an extract from [a] news bulletin published by the Ministry of Internal Affairs and Information, Benin City'.[1] Examination of the news bulletin showed that the content of the article was substantially the same. The defendants accordingly contended that the publication was entitled to qualified privilege under the Schedule to the Defamation Law of the western states[2] which, within the category of 'statement[s] privileged subject to explanation or contradiction', protects

> 'A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, office of state, local authority or superior officer of police'. 3

Commenting on the ambit of this provision, the court stated:

> 'This means that the report may be condensed but not coloured or unfair as a result of its omissions or abridgment. It need not be a complete report, provided that it presents to the reader an accurate picture'. 4

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1. Ibid., at 16.
2. Defamation Law (western states) Cap. 32.
3. Article 12, Part II, Schedule, ibid.
4. Akurefe and others v Sketch Publishing Co., supra at 17.

The court was satisfied that the article met this test; and, since the plaintiffs had proved neither that the defendants were actuated by malice nor that they (the plaintiffs) had requested[1] the publication of a reasonable explanation or contradiction which the defendants had failed or neglected to publish, it followed that the plea of qualified privilege under the statute succeeded - and the plaintiffs' claim was dismissed.

Statutory privilege is accordingly of great importance to the media - as this decision graphically demonstrates. In the circumstances, no other defence could have exonerated the defendants.

### 6.6.6. The statutory defence of 'innocent publication'

The inadequacy of common law defences for defamation was revealed by two well-known cases in English law. In Hulton v Jones,[2] Hultons published a humorous account (which was intended to be entirely fictitious) of the amorous exploits of one Artemus Jones at a festival in Dieppe. A barrister named Artemus Jones led evidence to show that associates of his had thought the publication referred to him - and he successfully claimed damages for defamation. In Cassidy v Daily Mirror,[3] the defendants published a photograph of Mr Cassidy, together with a woman and stated that 'their engagement ha[d] been announced'. Unknown to the defendants, Mr Cassidy was already married, and his wife successfully sued for defamation on the basis that her reputation had

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1. 'All that the plaintiffs' Solicitor [had done] ... was to write a general letter, the nature of which was not specified, and was not even referred to in the statement of claim, or given in evidence'. Ibid., at 18. This, following Khan v Ahmed [1957] 2 All E.R. 385, was not sufficient.

2. [1910] A.C. 20.

3. [1929] 2 K.B. 331.

been diminished through the innuendo that she had falsely been holding herself out as being married to him.

None of the common law defences could have availed the defendants in either case - and a statutory defence of 'unintentional' defamation was accordingly inserted in the Defamation Act of 1952.[1] In Nigeria, equivalent provisions are to be found in each of the Defamation statutes[2] - but do not apply in the vast northern states.

The elements of the defence and the procedure to be followed in relying upon it may be summarised as follows.

In order for a publication to qualify as 'innocent', the publisher must be able to prove

(i) either that he did not intend the alleged defamatory words to refer to the plaintiff and did not know of circumstances by which such reference might be inferred: the Hulton v Jones situation; or that the words were not prima facie defamatory and that he did not know of circumstances that might render them so: the Cassidy v Daily Mirror type of case;

and

(ii) that, in either event, he exercised all reasonable care in relation to the publication.[3]

All references to the 'publisher' in this regard are to be construed as 'including a reference to any servant or agent of his who was

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1. Section 4, Defamation Act, 1952, 15 & 16 Geo 6 Eliz. 2 c. 66.

2. s. 6, Defamation Law, of 1961 (Lagos State); s. 10 Defamation Law (western states) Cap 32; s 7 Defamation Law (eastern states) Cap 33. For convenience, further references will be limited to the appropriate provisions of the Defamation Law, 1961.

3. s. 6(5) Defamation Law, 1961, ibid.

concerned with the contents of the publication'.[1]

If the publisher wishes to rely on the defence of innocent publication, he must

(i) make an offer of amends (i.e., an offer to publish (or join in publishing) a 'suitable correction' and a 'sufficient apology') and, where the defamatory material has been distributed by or with his knowledge, must take 'reasonably practicable' steps to notify persons to whom it has been so distributed that 'the words are alleged to be defamatory of the party aggrieved';[2] and

(ii) accompany his offer of amends with an affidavit specifying the facts on which he relies to show that publication was 'innocent'.[3]

He must also (as further explained below) take these steps as soon as reasonably practicable after he receives notice that the words are, or might be, defamatory of the complainant,

If the offer is accepted by the complainant, he cannot subsequently bring a claim for damages against the offeror[5] - so that the provision (in theory at least)[6] provides an important safeguard against incurring

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1. Ibid.

2. s. 6(3), Defamation Law, 1961 ibid.

3. s. 6(2), ibid.

4. s. 6(1)(b), ibid.

5. s. 6(1)(a), ibid. The offer must, of course, also be duly performed; and the complainant is not, in any event, precluded from bringing proceedings 'against any other person jointly responsible for that publication'.

6. The provision does not appear to work well in practice, as further explained below.

heavy financial penalties for 'innocent' defamation. He may, however, be able to obtain an order for costs (or an indemnity basis) as well as reimbursement for expenses reasonably incurred as a consequence of the publication in question.[1]

If the offer is not accepted, the publisher will nevertheless have a good defence to a claim for damages for defamation if he is able to prove:

(i) that the words were published 'innocently' - with reference to the criteria described above;[2]

(ii) that an offer of amends was made as soon as practicable[3] and has not been withdrawn;[4] and

(iii) (where he himself is not the author of the words), that the words were written by the author without malice.[5]

In attempting to prove these essential elements of his defence, the publisher may only rely upon the facts specified in the affidavit which accompanied his offer of amends.[6]

This statutory defence has been criticised in a number of respects. First, it is considered too formal, time-consuming and expensive.[7]

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1. See s. 6(4), Defamation Law, 1961, supra.
2. s. 6(1)(b), ibid.
3. This requirement explains the need, in practice, for the offer of amends to be made reasonably quickly, as indicated above.
4. See s 6(1)(b), supra.
5. s. 6(6), ibid.
6. s. 6(2), ibid.
7. Callender Smith, op.cit., p. 19.

In addition, the limitation that the publisher may rely only on the facts specified in the affidavit places him in a dilemma: '[I]f he misses any evidence he cannot use it later ... but if he tries to collect every piece of evidence he may need [which may be particularly difficult where he personally was not the author of the defamatory material], the court may rule that he did not make the offer as soon as possible'.[1] Furthermore, the necessary evidence that the author (where not the publisher himself) was not actuated by malice may be extremely difficult to provide - especially in the case of an anonymous letter or report.[2]

The practical difficulties inherent in the provision are attested by the fact that, in the United Kingdom, there have been only two reported cases[3] on its meaning since its inception in 1952. Nigerian case law reveals no reliance on it at all. This clearly indicates that it is not frequently invoked in practice: and this conclusion is borne out by the findings of the Faulks Committee in the United Kingdom, which has recommended the repeal and replacement of a s. 4 of the Defamation Act 1952 by a simplified provision which 'would dispense with the need for an affidavit, allow argument about the offer of amends to be decided by the courts, allow the defence to go beyond their original statement of defence and, finally, abolish the requirement that a publisher who was not the author of the words should have to prove that the actual author was not malicious'.[4]

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1. Ibid.

2. Given the reality that newspaper 'sources' may often wish to preserve their anonymity, this requirement may work extremely harshly indeed.

3. See Callender Smith, ibid., and Duncan & Neill, op.cit., p.110.

4. Callender Smith, op.cit., p. 20. For further detail, see also the Report of the Committee on Defamation, Cmnd. 5909, 1975, para. 287.

6.6.7. Apology and payment into court

This defence differs substantially from that of 'unintentional defamation', discussed above. In English law, it is derived from the Libel Act 1843[1] (commonly known as Lord Campbell's Act),[2] as amended by the Libel Act 1845. In Nigeria, equivalent provisions have been incorporated in the Defamation Laws of the eastern and western states[3] - but not in the Defamation Law of 1961, applicable in Lagos State. It follows that in Lagos State as well as in the northern states of Nigeria (where no legislation similar to the Defamation Laws applicable in the south has been introduced), the provisions of Lord Campbell's Act continue to apply on the basis that the Act is 'a statute of general application in force in England on 1 January 1900' and has accordingly been received into Nigerian law by virtue of the general reception process previously described.

Unlike the statutory defence of 'unintentional' defamation, this plea is competent only in relation to defamatory material published in a public newspaper or other periodical publication.[4] It requires proof by the defendant that:

(i) the publication was made without actual malice;

(ii) that it was also made without gross negligence;

(iii) that a full apology was published before the commencement of the

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1. 6 & 7 Vict c 96.

2. Duncan & Neill, op.cit., p. 118, para. 16. 07 n 1; Nylander, op.cit., p. 31.

3. s. 14, Defamation Law (eastern states) Cap 33; s. 14 Defamation Law (western states) Cap. 32. See also s 18 Newspaper Law (E.S.), Cap 86.

4. The defence does not therefore extend to the broadcasting of defamatory material; nor to the publication of such matter in, for example, a book.

the action or at the earliest opportunity thereafter;[1] and that

(iv) a payment into court was made at the time the defence was served.

The onus lies on the defendant to show the adequacy of the apology, as well as the absence of actual malice or gross negligence. In the United Kingdom, the defendant in Bell v Northern Constitution Ltd.,[2] failed to discharge the latter onus for the court found that the newspaper's publication of the announcement of a birth without obtaining prior verification of a notice received by telephone constituted negligence of this nature. The question of gross negligence was also considered (albeit obiter)[3] in the Nigerian case of Edukugho v The Proprietors of the Sunday Times and others.[4] The defendants had published an article in the Sunday Times alleging, inter alia, that the plaintiff (who had been an official adviser to the London Conference on the Constitution of Nigeria in 1957)[5] had made no worthwhile contribution to its proceedings but, on the contrary, had not even attempted to understand what was happening and had spent his time shopping and visiting his girlfriends.[6] When the plaintiff claimed damages for defamation, the defendants sought, at one stage, to

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1. The apology may be published either in the same newspaper or, if this appears at intervals of more than one week, in any other newspaper of the plaintiff's choice.

2. [1943] N.I. 108 [cited by Duncan & Neill, supra].

3. The defence (under the equivalent provision of section 2 of Lord Campbell's Act) had in any event, been withdrawn, as further explained.

4. [1958] W.N.L.R. 215.

5. See the section on the History of Nigeria, at p. 88 above.

6. The article was not quite so explicit as it referred to the plaintiff and three other advisers by name and then went on to make general comments about the waste involved in sending a number of advisers, many of whom had made no contribution, but had, instead, spent their time shopping, etc. In the circumstances, however, the court was satisfied that the ordinary reader would consider the general comments applicable to the plaintiff and that he had therefore been defamed by the allegations - the substance of which was as summarised in the text above.

rely on this defence but subsequently withdrew it.[1] Whilst acknowledging that the defence was therefore no longer in issue, the court nevertheless indicated that it would not have availed the defendants for the article was 'so clearly a libel on the plaintiff [that] ... the defendants should not have printed and published [it] until they had made sufficient reasonable inquiries to find out if the article was based on facts'.[2] Accordingly, in the court's opinion, 'the defendants were in fact guilty of gross negligence in publishing th[e] article'.[3]

The defence is seldom used in practice.[4] It is more complex than a simple payment into court under the relevant Rules[5] and renders the defendant's chances of recovering his costs from the plaintiff as from the date of the payment into court more hazardous. Ordinarily, if a payment into court is made by the defendant and the damages ultimately awarded to the plaintiff are the same or less than this

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1. Although the requisite payment into court had been made, this had not been pleaded, nor had it been stated on what portion of the alleged libel the payment into court had been made. Counsel for the defendants therefore agreed that the defence was bad. Edukugho v The Proprietors of The Sunday Times and others, supra, at 218.

2. Ibid., at 221.

3. Ibid., The case also throws some light on the requirement that an apology be published as soon as practicable. The court was here concerned with mitigation of damages under s. 1 of Lord Campbell's Act but the same criteria would doubtless apply. In the particular circumstances, there had been a delay of some eight months between publication of the article and the subsequent apology, and this was considered excessive. (The court also considered the apology insufficient but did not explain why),

4. Duncan & Neill, op.cit., p. 118; Nylander,op.cit., p. 32 where he points out that 'it is more advantageous for a defendant to combine an apology with payment into court'. The reason for this is further explained below.

5. See, for eg, High Court of Lagos (Civil Procedure) Rules 0.37, rr. 2 and 5, Cap 211, 1948 Edition, Laws of Nigeria.

sum, the defendant is entitled to his costs as from the date of payment in. Where the defendant relies on this defence, however, this entitlement will not arise unless the defendant also discharges the onus of proving the various elements of the defence.[1]

6.6.8. Leave and licence or volenti non fit injuria

This defence rests upon the plaintiff's consent to, or acquiescence in, the publication in issue.[2] Although such consent may be either express or implicit from the circumstances, it must extend to the defamatory material complained of. Thus, in Moore v News of the World,[3] the plaintiff gave an interview to a reporter from the defendant newspaper, believing that it was intended to publicise her 'musical come-back'.[4] Instead, the article subsequently published focused on her relationship with her former husband, Roger Moore. The defence of 'volenti' failed.

6.6.9. Innocent Dissemination

This defence applies to the person who acts merely as the distributor of defamatory material but who is nevertheless, in law, considered responsible for publication as much as the author or publisher.[5] It is thus of particular importance to booksellers newsagents and

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1. Duncan & Neill, op.cit., p. 118.
2. Duncan & Neill, ibid., p. 115; Callender Smith, op.cit., p. 17; Nylander, op.cit., p. 33.
3. [1972] 1 Q.B. 441 (C.A.).
4. Callender Smith, supra.
5. Duncan & Neill, supra, p. 115.

libraries and provides the disseminator with a complete defence provided he can establish -

(i) that he did not know that the publication contained the libel in issue;

(ii) that he also did not know that the publication was 'of such a character that it was likely to contain libellous matter'[1]; and

(iii) that his lack of knowledge in relation to both (i) and (ii) 'was not due to any negligence on his part'.[2]

The operation of these rules is illustrated by Awolowo v Kingsway Stores and anor,[3] in which the defendants were the sellers and distributors in Nigeria of a book entitled 'The one-eyed man is king'. Certain passages in the book alleged that the plaintiff had been implicated in the Apalara murder case[4] and in subsequent attempts to curtail its proper investigation; and went so far as to state that the murder weapon had been found in the plaintiff's house and that he had subsequently been charged with complicity in the case but had been acquitted. None of these allegations was true.

When the plaintiff claimed £100,000 damages for libel, one of the defences relied upon by the defendants was that they were innocent disseminators of the book and should not be held responsible for publication of the libel. The court examined a number of English

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1. Duncan & Neill, op.cit., p. 116.

2. Ibid. For further detail regarding this defence, see Duncan & Neill, ibid., pp. 115 - 117.

3. [1968] 2 All. N.L.R. 217.

4. This had attracted considerable publicity because of its undertones of ethnic conflict: the Apalara were a Yoruba cult and most of the police and others charged with investigation of the murder were Ibos.

authorities on the defence[1] and ultimately concluded that, in order for it to succeed, the defendants must be able to show:

'(i) that [they] did not know that the book contained the libel or

(ii) that [they] did not know that the book was of a character likely to contain a libel and

(iii) that such want of knowledge was not due to negligence on [their] part'.[2]

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1. These included Emmens v Pottle, (1885) 16 Q.B.D. 354, Mallon v W.H. Smith and Son (1893) 9 T.L.R. 621, Vizetelly v Mudies Library [1900] 2 Q.B. 170 and Bottomley v F.W. Woolworth and Co. Ltd., (1932) 48 T.L.R. 521. Reference was also made to certain United States' authorities, including Onalee Bowerman v Detroit Free Press 120 A.L.R. 1230 and the Restatement of the Law of Torts Vol. III para 581 at p. 208. As regards the United States' authority referred to by the court, it is interesting to note that the court appears to have equated their approach with that of the English authorities and to have overlooked the substantial difference between them. The English authorities clearly support the view taken by the Nigerian court: that the distributor of defamatory material is liable for its publication unless he can show that there was no element of negligence in his conduct. Thus, liability is strict and the onus lies on the defendant to establish his innocence. By contrast, in the United States, according to the Restatement referred to by the Nigerian court, a distributor 'is not liable, if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognise as defamatory'. (Emphasis supplied) It follows that, on this approach, the onus lies in the first instance on the plaintiff to show that there are facts or circumstances known to the distributor which should put him on his guard. The practical result may in many circumstances be the same (as would probably have been been the case here if the United States' approach had been adopted) but the distinction in principle is nevertheless important.

2. Awolowo v Kingsway Stores and anor, supra, at 245.

In attempting to substantiate these requirements, both defendants led evidence to the effect, in essence, that they dealt in some 7,000 to 10,000 titles each year and that their representatives had accordingly merely glanced through the offending book before putting it up for sale. The court clearly had doubts as to the truth of the latter statements[1] and finally concluded that the defendants had failed to discharge the onus of showing that their lack of knowledge of the defamatory content of the book (assuming that they had not in fact known of it) was not due to negligence on their part. The court emphasised that the title in itself (alluding to the English saying that "in the country of the blind the one-eyed man is King") should have been enough to put the defendants' representatives on their guard.[2] The court also found it difficult to 'see how anyone, after reading a few passages in [the book], [could] fail to [appreciate] the need to make sure that [it] [did] not defame anyone in Nigeria'.[3] Hence, in the particular circumstances, the defence of 'innocent dissemination' could not succeed. The court was also at pains to point out, however, that it '[would] not go as far as to say that a book seller has a duty to read every book which he puts out for sale.'[4] Adefarasin, J. acknowledged that he '[could] see the difficulty in the way of booksellers in the position of the ... defendants who sell books in the order of between 7,000 and 10,000 copies if [they] were asked to do that'.[5] He went on the emphasise, however, that 'if circumstances exist about any book, which such book sellers are putting out on sale, which ought to put them on their guard or

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1. Ibid., at 250 and 253, by way of illustration.
2. Ibid., at 251.
3. Ibid.
4. Ibid., at 252
5. Ibid.

which ought to have led them to suppose that such book contains a libel they would be liable if they acted negligently and put such book out for sale'.[1] Adefarasin, J. acknowledged that the 'same duty may not be required in respect of books of an entirely different character such as fiction, poetry, literature, Art, etc.'.[2] In the instant case, however, the circumstances (as outlined above) were such as to have put the defendants on their guard; and they should have taken further steps to satisfy themselves that the book contained no defamatory allegations before they put it out for sale. Hence the defendants were not innocent disseminators - but, on the contrary, were liable to the plaintiff[3] in damages.[4]

The principle - derived from English authority[5] - thus applied by the court in these proceedings may operate extremely harshly against the distributor of defamatory material, who is prima facie liable for its publication unless he can establish his innocence.[6] The danger this represents to freedom of expression is well illustrated by the recent English decision of Goldsmith v Sperrings Ltd and others.[7]

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1. Ibid., at 252-253.

2. Ibid., at 253.

3. Ibid., at 257.

4. The quantum of damages awarded by the court is discussed further at p. 544.

5. As previously noted at p. 526, the Nigerian court appears to have erred in equating United States' authority with English precedent. The United States' approach is substantially different in that it places the burden of proving the guilty knowledge of the distributor on the plaintiff.

6. In the sense that he did not know that the publication did - or was likely to - contain defamatory matter.

7. [1977] 1 W.L.R. 478 (C.A.); 509 (H.L.(E.)). No judgment in the matter was given by the House of Lords, as leave to appeal against the ruling of the Court of Appeal was refused by the Appeal Committee of the House of Lords. See ibid, at 509.

Here, the plaintiff (an influential company chairman and director) alleged that he had been libelled in three consecutive issues of the controversial and satirical magazine Private Eye. He commenced civil proceedings against its editor and main distributors and criminal proceedings against its publishers.[1] In addition, the plaintiff issued 74 writs against 37 secondary wholesale and retail distributors of the magazine in respect of the second and third articles, claiming damages and an injunction in regard to each article. Sixteen of the distributors settled with the plaintiff on the basis that they would henceforth cease handling the magazine altogether. The circulation figures of the paper dropped from 100,000 to 88,000. The remainder of the 37 secondary distributors applied for an order staying or dismissing the actions against them as an abuse of the process of the court 'in that the plaintiff's purpose in pursuing the actions against the distributors was ... not ... to protect his reputation but the collateral purpose of destroying the paper by cutting off its retail outlets'.[2] A stay was granted by Master Warren but was lifted on appeal; and, on further appeal to the Court of Appeal, it was confirmed, by a majority of 2:1 (Lord Denning M.R. dissenting), that the actions should be allowed to proceed. In so ruling, the majority of the Court of Appeal was satisfied that the plaintiff's purpose in all the litigation was merely to 'vindicate his reputation and [to] prevent further anticipated attacks upon it'.[3]

The dissent of Lord Denning M.R. was forceful and - it is submitted -

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1. This aspect of his claim is further considered in Chapter Seven (on the criminal law of defamation), below.

2. Goldsmith v Sperrings Ltd., supra, at 479.

3. Ibid.

cogent. He was clearly satisfied (and the evidence which he adduces seems plainly to support this conclusion)[1] that '[t]he plaintiff's predominant purpose in suing the distributors was to shut off the channels of distribution of the paper'[2] and that this was an abuse of the process of the court. He further stressed the vital importance of keeping open the channels of distribution; and warned that the freedom of the press depends upon this.[3]

The heart of the matter is, however, emphasised in the judgment of Scarman, L.J., who pointed out that '[i]f there is a threat to freedom of the press in these proceedings it comes from the law itself, which provides a cause of action, not only against publishers of a libel, but also against distributors'.[4] This is, indeed, the crucial point. Opinions on particular factual circumstances may differ (as the case itself graphically demonstrates - the majority believing that the facts disclosed no collateral purpose in bringing the proceedings and

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1. Lord Denning M.R. thus pointed out that the plaintiff issued the writs without any semblence of warning or attempt at prior negotiation; that he issued 74 separate writs where he could have issued one or two, and then have joined the other distributors in the proceedings; that he refused to accept any lesser undertaking from the distributors (in agreeing settlement) than that they should cease entirely to handle Private Eye in future; and that he threatened (by implication if not expressly) that failure to settle on the terms demanded would lead to the institution of criminal prosecution against the distributors.

2. Goldsmith v Sperring Ltd., supra, at 496.

3. The importance of freedom of distribution has been emphasised in the United States, as further explained at p 351 above, as a vital part of the principle that there should be no 'prior restraint' on publication.

4. Goldsmith v Sperrings Ltd., supra, at 501, per Scarman, L.J.

Lord Denning, M.R. taking a diametrically opposite view ; but the main difficulty lies in the way in which the law is formulated at present: for it weights the scales too heavily against the distributor and places on him an extremely difficult burden of proof. The sixteen secondary distributors who agreed to settle with the plaintiff must undoubtedly have been influenced in their decision by the difficulty of discharging the burden of proving not only that they did not know that particular issues of Private Eye contained matter allegedly defamatory of the plaintiff but also that they did not know that the magazine was likely to contain such matter. As soon as objection was taken by the plaintiff to the first article (let alone the second or third) the onus - given the objective test by which it is governed[1] - would have been impossible in practice to discharge. It follows that any publication which engages in investigative journalism and as a result makes allegations which may well be defamatory but which may also touch on issues of vital public concern is vulnerable to having its outlets closed in the manner illustrated by the Goldsmith case. As soon as the publication becomes contentious, and especially if a libel writ is served on it (as had in fact happened to Private Eye on a number of occasions in the past), it may well become difficult for a distributer to establish that he did not know or suspect that a particular issue of the publication contained

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1. As explained above, and reiterated below, the distributor must be able to prove not only that he did not know that the particular publication contained defamatory matter or that he did not suspect that it was likely to do so - but also, in both instances, that his lack of such knowledge was not due to any negligence on his part. Accordingly, his conduct falls to be judged by the standard of the reasonable man: who would undoubtedly take precautions which any busy distributor, dealing in a considerable number of publications, would not in practice be able to implement.

defamatory matter and that his lack of knowledge was not due to any negligence on his part. It follows that Scarman, L.J. was right to emphasise that the principal fault lies in the law itself - and that this requires reform if freedom of expression is to be safeguarded.

## 6.7. The Relevance of the Defendant's Intentions and the Significance of Express Malice.

Except in those instances where 'express malice' negatives a defence of fair comment or qualified privilege (as explained below), the defendant's intention in publication is generally irrelevant, the question in issue being determined, instead, by objective tests. Thus, 'reference to the plaintiff' is decided on the basis of the understanding of the ordinary reader or listener, as graphically illustrated by Hulton v Jones[1] and the Nigerian decision of Bakare v Oluwide and others.[2] Likewise, whether the publication in issue is defamatory in meaning in no way depends on the defendant's intention[3] - or even, ironically, on the way it was in fact understood. The likely interpretation of the ordinary 'right-minded' member of society is instead the crucial criterion.[4] Accordingly, - and somewhat irrationally - if defamatory matter is proved to be true, the defence of justification exonerates the defendant even if, in fact, he wished the plaintiff ill - and this was the underlying motive for publication.[5] Further,

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1. See discussion at p. 516.
2. See discussion at p. 472 above and see also Duncan & Neill, op.cit., p. 25.
3. Duncan & Neill, ibid., p. 11.
4. Ibid., p. 12.
5. Ibid., p. 55.

where a statement is published on an occasion 'absolutely' privileged, the defendant's intention is unimportant,[1] as is his understanding of whether or not the occasion was (in law and fact) so privileged.[2] In addition, the usual allegation in the plaintiff's claim that the defamatory words were published 'maliciously' by the defendant is unnecessary and misleading[3] since what is really in issue is whether the defendant published them 'without lawful excuse' - and this the law presumes in the plaintiff's favour (leaving it to the defendant to rebut the inference, if he can, by proof of an appropriate defence).

All this should not, however, obscure the importance of 'express malice' in the context of 'fair comment' and 'qualified privilege' (common law or statutory). The term is somewhat unfortunate for two reasons: First, it connotes 'spitefulness' or 'ill-will' and malice, in law, has a wider ambit than this and includes, for example, the desire to achieve some personal advantage rather than to injure the plaintiff. Secondly, where there is evidence of ill-will between the parties, the court may 'find it difficult to appreciate that [this] ... is not equivalent to proof that the defendant was actuated by malice at the time of publication'.[4]

In the United Kingdom, the leading authority on the elements of express malice is now the House of Lords decision in Horrocks v

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1. Whether the occasion is privileged in this degree is for the court to decide; and if it is so privileged, the defendant has a complete defence. See Duncan & Neill, op.cit., Chap. 13 in which the defendant's intention is not mentioned, because - it is submitted - it is irrelevant.

2. Duncan & Neill, ibid., para 14.06, p. 100. Note, however, the submission by Duncan & Neill that '[d]espite this general rule ... a person to whom an inquiry is addressed is entitled to the protection of qualified privilege for his answer if he has a bona fide, though mistaken, belief that the circumstances are such as would confer a privilege'.

3. Ibid., p. 120.

4. Ibid., p. 121.

Lowe[1] which although, decided in the specific context of qualified privilege, nevertheless lays down propositions of a general nature which would seem equally applicable in the context of fair comment.[2] The elements of express malice may be summarised as follows:

(i) the improper motive must be the sole or dominant motive;

(ii) the defendant's motive is to be inferred from his words and conduct but evidence that he did not believe in the truth of what he published is generally conclusive proof of express malice;

(iii) recklessness by the defendant as to its truth may be taken as evidence that he knew it was false - but not mere carelessness, impulsiveness or irrationality;

(iv) evidence that the defendant did believe it to be true does not exclude express malice, but the court should be slow to infer, in these circumstances, that the sole or dominant motive was the improper one.[3]

The final crucial principle (as confirmed in Horrocks v Lowe)[4] is that the burden of proof - once the defendant has established the elements of either fair comment or qualified privilege - lies on the plaintiff to show express malice. If the plaintiff fails to do so in such circumstances, his claim must be dismissed. Furthermore, the question whether the defendant was actuated by express malice is one which must be placed in issue by the plaintiff himself, and which should not be raised by the court of its own

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1. [1975] A.C. 135 esp. at 149-151 (reproduced by Duncan & Neill, ibid, pp. 121 - 123 .

2. Duncan & Neill, ibid., p. 125.

3. See Duncan & Neill, op.cit., pp.121-126 esp. paras. 17.06 and 17.10 .

4. [1975] A.C. 135.

accord, Thus, in Bakare and anor. v Ibrahim,[1] the Nigerian Supreme court held that the trial judge had erred in considering the question of express malice - for, in his pleadings, the plaintiff had filed no reply to the defendants' plea of fair comment so as to place express malice in issue. The Supreme Court emphasised that it was 'decidedly in support of the well-known rule of pleading and practice that, in an action for defamation, where it is intended to allege express malice in answer to a plea of fair comment or qualified privilege, it is necessary to deliver a Reply, giving particulars of the facts from which express malice is to be inferred'.[2] Its underlying reason was that 'it is only fair, and indeed, quite in keeping with the principles of justice, that the defendant, whose defence is fair comment or qualified privilege, ought [not][3] to be exposed to any kind of surprise'.[4]

The ingredients and effect of express malice are further illustrated by the following[5] Nigerian cases. In Ajala v Showunmi[6], the defendant

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1. [1973] 6 S.C. 205. The defendants had published a notice in the West African Pilot warning the public that the plaintiff had no authority to sell the shares of a particular company. When the plaintiff claimed damages for libel, the defendants raised the defence of 'fair comment' and the trial court found that the facts they relied on in support of this plea were substantially true. The trial court then, however, proceeded to consider the defendants' underlying motives - even though no allegation of express malice had been raised in the pleadings. It found that the defendants had been actuated by such malice, so that their plea was negatived, and the plaintiff entitled to damages. The Supreme Court reversed this decision. There was insufficient evidence of express malice and, in any event, the question should not have been considered at all on the pleadings which had been filed.
2. Ibid., at 215.
3. It is submitted that the omission of this word is an oversight.
4. Supra.
5. See also African Newspapers of Nig. Ltd v Coker [1973] 1 N.M.L.R. 386; and Amieklah v Okwilage [1962] 2 (Part 2) All N.L.R. 3.
6. [1977] 1 C.C.H.C.J. 25.

wrote to the Chief of Staff of the Nigerian army (and copied the letter to the Director of the Public Army Corp) alleging that the plaintiff, a major in the army, had - in the company of two armed soldiers - demolished a wall on the defendant's land and that he (the plaintiff) had also 'stood around brandishing a revolver'. The court found that allegations of such conduct on the part of an army officer were prima facie defamatory but was also prepared to accept that the letter - sent to the plaintiff's superior officer - was protected by qualified privilege. There remained, however, the question of express malice. The evidence showed that there was a long-standing dispute over the land on which the wall had been built - the plaintiff alleging that it was part of the public highway and the defendant claiming it as his own. In addition, the allegations that the plaintiff and soldiers accompanying him were armed and 'poised for action' against the defendant was contradicted by apparently reliable testimony - indicating that the defendant was aware of the falsity of his accusations. Hence, the court concluded that the defendant had indeed been actuated by express malice. The plea of qualified privilege accordingly failed and the plaintiff was found entitled to damages.

In Awolowo v The West African Pilot Ltd and anor,[1] the defendants made no attempt to substantiate their allegations against the plaintiff (that, inter alia, he had lied in his autobiography, had aroused anti-Ibo sentiment and had been prepared to betray his own political party for personal advancement); and the court accordingly accepted that they knew these to be false, or were reckless as to their

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1. [1962] W.N.L.R. 29.

truth or falsity. Hence, the pleas of fair comment and qualified privilege could not succeed.[1]

In Williams and others v The West African Pilot Ltd.,[2] the court's ruling on express malice was strictly obiter since it was, in any event, satisfied that the defendants had failed to substantiate the allegations of fact on which they based their defence of 'fair comment'. It is interesting to note, however, the factor which the court particularly singled out as evidence of express malice. This was the fact that the libels in question (which related to the plaintiffs' conduct during the 1951 elections) 'were not contemporaneous with the events but were a sudden crusade with no justifiable reasons to support it'.[3] This, in the court's view, 'destroy[ed] the protection offered by th[e] ... plea'.[4]

Whether this fact constitutes sufficient evidence of express malice is open to considerable doubt. The court's focus on this particular circumstance is difficult to square with the principles enunciated by the House of Lords in Horrocks v Lowe, as described above, for determining when malice may be held to defeat a prima facie defence of qualified privilege or fair comment. There was no evidence before the court to show that malice was the dominant motive underlying publication, nor did the court attempt to assess whether the defendants' belief in the truth of their allegations was 'honest' even though possibly also the result of 'carelessness, impulsiveness or

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1. Ibid., at 39.

2. [1961] W.N.L.R. 330.

3. Ibid., at 343

4. Ibid.

irrationality'.[1] The fact that the cartoons were published only eight years after the event does not necessarily show that the defendants, (in publishing) were merely 'giv[ing] vent to personal spite or ill will towards the [plaintiffs]'.[2] On the contrary, it is quite possible that the secret conspiracy had only then come to light. To take the example of the Watergate scandal in the United States, if information regarding the electoral malpractices there in issue had emerged only eight or so years later, would it have constituted evidence of express malice if the Washington Post and New York Times had only then begun to make their allegations of misconduct? It is submitted that the answer must be in the negative; and that the Nigerian court therefore erred in its assessment of the 'malice' factor.

In addition, evidence of express malice may also be found in the language itself: as, for example, where this '[is] violent or excessively strong'.[3] This must, however, remain suspect to the proviso that wide latitude is necessary in the interests of free speech.[4] Failure to retract or to apologise has also, on occasion,[5] led to an inference of such malice, but there is a danger in this for a refusal to apologise may also be consistent with a sincere and genuine belief in the truth of the defamatory allegations. If, however, a defendant is provided with proof, after publication, that he was

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1. See Horrocks v Lowe, [1975] A.C. 135 at 150.

2. See ibid.

3. Adam v Ward [1917] A.C. 309 at 339 [cited by Duncan & Neill, op.cit., p. 127].

4. Ibid., at 330.

5. Duncan & Neill, ibid., p. 128.

mistaken and what he said untrue and if he still refuses to retract or to apologise, then this may indeed provide good evidence of express malice.[1]

## 6.8. Damages for Defamation

Apart from an injunction against further publication (in appropriate circumstances), the only relief the successful plaintiff in a defamation action may claim is an award of damages.[2] The purpose of such award is not to punish the defendant,[3] but to compensate the plaintiff and 'restore [him], as far as money can do so, to the position he would have been in if the tort had not been committed'.[4] The difficulty of applying this well-established principle of restitutio in integrum in defamation cases, however, is that (as in instances of physical injury involving, for example, the loss of a limb) the pain and distress caused to the plaintiff is not truly measurable in monetary terms. The correct figure cannot be determined 'by any purely objective computation'[5] - and thus the damages for defamation are said to be "at large".

The factors to be taken into account in such assessment have been described by the Supreme Court of Nigeria, in Uyo v Egware[6] as follows:

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1. Duncan & Neill, op.cit., p. 129
2. Ibid., p. 130
3. Ibid. See also Awolowo v Kingsway Stores and anor, [1968] 2 All N.L.R. 217 at 259.
4. Duncan & Neill, supra, p. 131.
5. Cassell & Co Ltd v Broome, [1972] A.C. 1027 at 1070 per Lord Hailsham of Marylebone L.C.
6. [1974] 1 All N.L.R. 293.

> 'Such an award [i.e., for defamation] must be adequate to repair the injury to the plaintiff's reputation which was damaged, the award must be such as would atone for the assault on the plaintiff's character and pride which were unjustifiably invaded; and it must reflect the reaction of the law to the imprudent and illegal exercise in the course of which the libel was unleashed by the defendant'. 1

In Awolowo v Kingsway Stores and anor,[2] the High Court of Lagos, relying on Gatley,[3] identified the relevant criteria as:

> '...the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct of the defendant and the evidence led in aggravation or mitigation of damages'. 4

With respect, however, neither of these analyses offers sufficient guidance and it is submitted that it is more helpful to consider assessment of damages under the following heads;[5]

(i) Special damage. This means, in essence, any material loss capable of being estimated in money[6] and comprises, therefore, the pecuniary loss resulting from attendant termination of employment or loss of business (whether general or specific).

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1. Ibid., at 297, per Coker J.S.C.
2. [1968] 2 All N.L.R. 217.
3. Libel and Slander, 6th Edition, paragraph 1380 - cited ibid., at 259.
4. Awolowo v Kingsway stores and anor, supra, at 259.
5. See Duncan & Neill, op.cit., pp. 134-144.
6. Ibid., para 18.10, p. 134.

(ii) Injury to the plaintiff's feelings, including aggravating factors. The court is entitled to take into account the plaintiff's 'grief and distress ... at being spoken of in defamatory terms',[1] and to consider 'if there has been any kind of highhanded, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence'.[2] In such circumstances, the plaintiff may be entitled to 'aggravated damages' (as appropriate compensation for his loss, rather than as a punishment to the defendant). The factors that may lead to such an award are many and varied, but two of the most common are the defendant's refusal to apologise or unsuccessful plea of justification.[3]

(iii) The extent of publication. This clearly bears a direct relationship with the potential injury to the plaintiff's reputation and is thus a crucial factor. Accordingly, publication in a national newspaper with wide-ranging circulation, or over radio or television, is likely to increase the damages claimable - as illustrated by Williams and others v West African Pilot Ltd.,[4] where the court (in assessing damages) emphasised the fact that the newspaper in which the defamatory cartoons[5] were published was 'a very important national daily [with] a very wide circulation within the Federation of Nigeria, and possibly in other countries [as well] ... and that it exercises immense influence on its readers elsewhere'.[6]

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1. McCarey v Associated Newspapers Ltd. (No 2) [1965] 2 Q.B. 86 at 104 per Pearson, L.J. [cited by Duncan & Neill, ibid., para 18.12, p.135].

2. Ibid.

3. Duncan & Neill, ibid., para 18.13, p.136, and see also the discussion of the plea of justification at p. 486 et seq.

4. [1961] W.N.L.R. 330 4. supra, at 343.

5. The content of these cartoons is discussed at p.547.

6. See n 4 above.

It must be remembered, however, that the nature as well as the size of the group to whom publication is directed is important - and that limited publication to the plaintiff's friends or work associates may accordingly result in equal harm.

(iv) Mitigating factors. These are important in reducing the damages otherwise appropriate and though their content may be infinitely variable, depending upon the particular circumstances, they clearly include matters such as the plaintiff's reputation prior to publication of the defamatory material,[1] whether the plaintiff in any way provoked the publication by his behaviour towards the defendant,[2] whether the defendant has apologised[3] and whether it is clear that he was not, in fact, actuated by malice in making the publication.[4]

(v) The possibility of obtaining exemplary damages. Such damages are intended to be punitive, and may be claimed only in three sets of circumstances:

(a) 'where the plaintiff has been injured by oppressive, arbitrary or unconstitutional action by servants of the government';[5]

(b) 'where [such] damages are expressly authorised by statute';[6]

and (c) 'where the defendant deliberately sets out to reap financial benefit for himself at the expense of the plaintiff's reputation.

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1. Duncan & Neill, op.cit., pp.137 -140, where the authors discuss, in some detail, the difficulties of leading evidence of general bad reputation.

2. Duncan & Neill, ibid., para 18,.19, p. 140.

3. Ibid, para 18.20. See also ss 8 and 17, Defamation Laws (W.S. and E.S.).

4. Ibid., para, 18.21, p. 141.

5. Ibid., p. 142.

6. Ibid.

The rationale for awarding exemplary damages in the third instance has been well summarised by Lord Devlin in Rookes v Barnard[1] as being 'to teach a wrongdoer that tort does not pay'.[2] Thus,

> 'Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity'[3] -

and exemplary damages may be awarded.

The leading case in the United Kingdom is now Cassell & Co Ltd v Broome[4] where the defendant publishing house ignored prior warnings that a book describing a disastrous ships' convoy to Russia during World War II might contain defamatory matter, and proceeded to advertise it as a 'sensational interpretation of a naval disaster'.[5] The House of Lords upheld an award of £15,000 compensatory damages and £25,000 exemplary damages[6] on the basis[7] that 'it could properly be inferred that [the defendants] thought that it would pay them to publish the book and risk the consequences of any action the [plaintiff] might take'.[8]

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1. [1964] A.C. 1129 [cited by Duncan & Neill, op.cit., p. 143].
2. Ibid., at 1226.
3. Ibid.
4. [1972] A.C. 1027.
5. Callender Smith, op.cit., p. 54.
6. Ibid.
7. For further examination of the court's reasoning and conclusions, see Duncan & Neill, supra, pp. 143 - 145.
8. Cassell & Co Ltd v Broome, supra, at 1088, per Lord Reid.

In Nigerian law, the question appears to have arisen for decision in only one case: Awolowo v Kingway Stores and anor.[1] Here, exemplary damages were claimed against the defendants, the distributors of a book entitled "The one-eyed man is king" which was found by the court to contain defamatory allegations that the plaintiff had been implicated in the Apalara murder case and in the subsequent attempts by the authorities to curtail its proper investigation.[2] The argument in favour of exemplary damages was that the defendants 'stood to made [a] profit out of [the book]'.[3] The court, however, found this an insufficient basis for the award of punitive damages - emphasising the 'booksellers and distributors circulate books for profit'[4] but that this fact alone does not necessarily place them in the category of 'persons who profi[t] by their own wrongdoing'.[5] The court was clearly influenced by the fact that only 152 copies of the book were distributed in total and that the defendants took steps to withdraw it from circulation as soon as they were informed of the libel. Thus, in all the circumstances, the court's conclusion was that:

> 'A more direct and substantial pecuniary benefit [would have to] be shown to make a bookseller or distributor liable for punitive or exemplary damages'. 6

One final point regarding the assessment of damages is that an appeal court will not lightly overturn the decision of the court a quo

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1. [1968] 2 All N.L.R. 217.
2. The facts of this case are discussed further in the section on the impact of defamation laws on freedom of expression at p. 551.
3. Awolowo v Kingsway Stores, supra, at 262.
4. Ibid., at 263
5. Ibid.
6. Ibid.

in this regard - as was emphasised by the West African Court of Appeal in Zik's Press Ltd v Ikoku[1] and reiterated by the Nigerian Supreme Court in Uyo I v Egware.[2] In the latter case, the plaintiff appealed against the quantum of damages (£300) awarded him at the trial of the action. The Supreme Court pointed out that:

> '... appellate courts are very reluctant to ... attempt to re-assess the amount of damages the trial judge has given, and ... they will never do so unless it can be established that at the trial the judge proceeded upon a wrong principle of law or that his award was clearly an erroneous estimate, since the amount was manifestly too large or too small'[3].

In the particular circumstances, however, (given the serious nature of the libel - that the plaintiff had treacherously collaborated with the rebels during the Civil War - as well as the high social standing of the plaintiff, who was the 'Ovie' of the Ozoro community) the trial judge had clearly erred and his award was increased to £1000.

## 6.9. The Impact of the Civil Law of Defamation on Freedom of the Media in Nigeria.

The impact of the civil law of defamation on freedom of the media - especially in the vital context of the expression of criticism and dissent regarding political issues - is not easy to assess. The point has previously been made[4] that, in the years immediately following independence in Nigeria, defamation was one of the most frequently

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1. (1951) 13 W.A.C.A. 188.
2. [1974] 1 All N.L.R. 293.
3. Ibid., at 295 citing Zik's Press, supra, at 189.
4. See the section on the Significance of the Law of Civil Defamation at p. 461.

litigated torts and that 'the plaintiffs in defamation actions in the early 1960s included most of the leading political personalities at the time, [whilst] ... there was hardly a national newspaper which was not a defendant in at least one such action during the period'.[1] This indicates that the civil law of defamation must have had some impact on the expression of politically oriented criticism and comment; and it is accordingly important to determine whether the law has operated well in practice in providing a necessary shield against unjustified and derogatory verbal attack; or whether it has gone too far in curtailing the freedom to canvass issues of vital public importance. The question is perhaps best addressed by examining some practical examples of the law in operation; and then attempting to analyse the significance of these.

In Williams and others v The West African Pilot,[2] the plaintiffs, as previously described,[3] sued for damages for defamation arising out of the publication, in the West African Pilot, of a series of ten cartoons alleging, in essence, that the plaintiffs had plotted to win the 1951 elections through a combination of fraud and intimidation and - subsequently - to subvert (though bribery) the victory nevertheless achieved by their political opponents, the N.C.N.C.[4] The nature of the allegations in issue is perhaps best illustrated by quoting the court's description of three of the offending cartoons.

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1. Kodilinye, op.cit., p. 131.

2. [1961] W.N.L.R. 330.

3. See pages 470 and 497 especially.

4. For a further description of this political party and its arch-rival, the Action Group (A.G.), see the section on the History of Nigeria, at p 77 and 82 respectively.

The seventh cartoon in the series was headed '"A Master Plan"'[1] and showed the cartoon character called the 'Fuehrer' (whom the court had previously found referred to Chief Awolowo) saying to his co-conspirators - the 'Brain' (alias Chief Rotimi Williams) and the 'Propagandist' (alias Chief Akintola): '"Now comrades, we must mortgage all our properties to our last pair of trousers in order to raise a colossal loan with which to operate our bribe-and-win scheme"'.[2] In the ninth cartoon, 'the Brain was depicted as setting out before his two comrades ... the plan to employ thugs and ex-convicts for mass impersonation and fraud at the polls "so we could command over-whelming majority in the new legislature"'.[3] The tenth cartoon showed a meeting of the same three characters after the election results were known and 'it showed the three men in a most unhappy mood after what was claimed to be an N.C.N.C. victory ... [with] the Fuehrer ... telling his other two comrades what their next plan should be. Underneath the cartoon [were] the words "Plans for the Last Card" and the Fuehrer was alleged to say -

> "It's Incredible, It's Terrible, that the N.C.N.C. Could Win the Majority inspite of our great scheme, The only Hope now is for us to bribe all the 'soft' N.C.N.C. victors to cross carpet to our party"'. 4

The defendants, as previously described,[5] made singularly little effort to substantiate the truth of their allegations - and the court

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1. Williams and others v West African Pilot, supra, at 333.
2. Ibid.
3. Ibid.
4. Ibid., at 334.
5. See p. 497.

had no hesitation in concluding that they were false and in awarding the plaintiffs damages totalling £10,500 plus costs.

Was the law of defamation used here to stifle vital political criticism? The answer depends on what did in fact happen in the 1951 elections. If the plaintiffs had been guilty of the conduct alleged - or if there were reasonable grounds for suspecting this - then it would be vitally important, in the general public interest, that this should be exposed and brought to public attention. In this regard, it is worth recalling that there is considerable evidence of electoral malpractice in different parts of Nigeria in the past. Thus, it was partly the intimidation experienced by the Action Group in attempting to campaign for the 1951 elections in the then Northern Region which prompted the establishment of the Minorities Commission and the introduction of the Bill of Rights.[1] In addition, it is clear that the 1964 and 1965 elections (especially the latter) were rigged to a considerable extent, as chronicled in some detail by Nwabueze.[2] Against this background, it seems particularly important that any further allegations of electoral irregularities should be canvassed in full. On the other hand, if the plaintiffs were entirely innocent, it is equally important that the law of defamation should have been available to assist them in redressing the damage to their reputation and standing in Nigerian society. Unfortunately, however, it is extremely difficult to ascertain the truth of these allegations of electoral malpractice; and the difficulty is compounded by the secrecy which *ipso facto* surrounds such a conspiracy.

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1. See the section on the Nigerian Bill of Rights, at p. 171 above.

2. B.O. Nwabueze, Constitutionalism in the Emergent States, London, 1973, pp. 148-150.

Given the difficulty of proof in such circumstances, it must be queried whether the civil law of defamation strikes the right balance between competing interests by assuming the falsity of defamatory allegations - and placing the onus on the defendant to establish their truth. This question is considered further below.[1]

In Awolowo v The West African Pilot Ltd and anor,[2] the plaintiff claimed that he had been defamed by articles alleging, inter alia, that he had disrupted harmonious relationships between the Yoruba and Ibo and that he was prepared to 'bribe and cringe his way' to any important position in government. His claim succeeded and the court awarded him damages totalling £8,000. Again, the question whether the law of defamation worked "badly" - to stifle legitimate criticism - or "well" - to protect a reputation unjustifiably attacked - depends on whether the allegations were true. The court found them false; and this conclusion (on the evidence placed before it) seems fully justified. The defendants led no evidence to substantiate the truth of the second allegation; nor did they produce much to support their assertion that the plaintiff was "anti-Ibo". Passages from the plaintiff's autobiography which were relied upon by the defendants in this regard were rejected by the court as insufficient to substantiate the allegation. On the contrary, in the court's opinion, they showed that 'what ha[d] been done by the author [of the article in issue] [was] to pick on [certain] extracts ... [and to] interpret them not just as a criticism of Dr Azikiwe's conduct[3] in certain respects

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1. See p. 560 et seq.

2. [1962] W.N.L.R. 29.

3. The articles in issue had been published in response to the prior publication of an article entitled 'What I think of Zik', drawn from the plaintiff's autobiography 'Awo'.

but as an attack on the Ibos.'[1] There is nothing in the judgment itself to indicate that the defendants were precluded in any way from bringing further evidence before the court in order to show the truth of their accusations against the plaintiff[2] and there seems no reason to reject the court's findings on the facts, that the allegations were false. If that is so, it follows that the law of defamation worked "well" in this instance in protecting the plaintiff's reputation against unjustified attack (even though the quantum of damages awarded was possibly rather high).[3]

Another case with clear political implications is Adedoyin v Nigerian National Press Ltd., and anor[4] in which the plaintiff (the Speaker of the Western House of Assembly) was, by innuendo,[5] alleged to be implicated in arms-smuggling operations. The court awarded him £250[6] as damages for defamation. Again the law of defamation must

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1. Awolowo v West African Pilot Ltd and anor, supra, at 35.

2. Contrast this with the case of African Press Ltd and anor v Attorney-General Western Nigeria, [1965] 1 All N.L.R. 12 discussed at p.424 above in the section on Sedition where a Ministerial certificate that disclosure would not be in the public interest prevented the defendants obtaining access to a number of documents which would (arguably at least) have helped them to substantiate their allegations.

3. It is arguable that the articles would not have been taken particularly seriously by the average reader in view of their somewhat "wild and woolly" assertions. See, for example, the extract reproduced at p.35 which begins: '"History bears witness that Ibos had lived in harmony with their Yoruba brothers until in 1945 when Chief Awolow wrote in London inter alia: 'Ibos belong to the lowest strata of society yet they make loudest noise for self-government"'.

4. [1964] 2 All N.L.R. 9.

5. See the discussion at p.482 above for further detail as to how the innuendo was constituted.

6. Damages were assessed at this rather low figure on the basis, inter alia, of evidence (by the plaintiff's own witness) that he had thought the plaintiff just the type to engage in arms smuggling: thus indicating that the plaintiff's reputation, prior to publication of the libel, had not been particularly good.

be regarded as having worked "badly" if the allegations were true and "well" if they were not. The court found them false and - again - this conclusion (on the evidence placed before it) does seem justified. The judgment is not entirely clear in this regard, but it appears[1] that all the defendants succeeded in establishing was that 'the plaintiff was not present when his houses were searched';[2] and this, of course, did not prove his involvement in the arms operations. At the same time, it must be acknowledged that proof of the plaintiff's involvement in secret operations of this kind would not be easy to provide; and it is also worth recalling[3] that the plaintiff's own witness had informed the court that he had thought the plaintiff just the type to engage in arms smuggling. The court considered this assessment of the plaintiff's character as relevant only to the question of damages - and had accordingly awarded the plaintiff a sum considerably lower than that claimed. However, the comment does also call to mind the aphorism that there is 'no smoke without fire'; and once again raises the question whether the law of defamation strikes the right balance between the individual's right to protection of reputation; and society's right to be informed of matters of great public concern.

A further example of a publication with political implications (again involving Awolowo) is Awolowo v Kingsway Stores (Nig.) Ltd and anor.[4]

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1. Unfortunately, the court did not deal crisply with this issue. It is submitted that this is nevertheless a legitimate inference from its comments at 14.

2. Supra, at 14.

3. See n 6, p 550 above.

4. [1968] 2 All N.L.R. 217.

Here the plaintiff was alleged to have been implicated in the Apalara murder case and its official "cover-up". His claim for damages for defamation succeeded and the court awarded him £5000, plus costs assessed at £210. The defence principally relied upon by the defendants was that of innocent dissemination, so little argument was addressed to the truth or falsity of the allegations against the plaintiff. One assertion at least - that the plaintiff had been charged but acquitted of complicity in the murder - was clearly false and though some attempt was made, in the final sentences of the offending paragraph, to "clear" the plaintiff by stating that 'he would have preferred his complete innocence established', the court was nevertheless satisfied that the passage, taken as a whole, 'left the reader with the firm impression that Awolowo's complete innocence had not been established'.[1]

Viewed against this background, the answer to the question whether the law of defamation worked "well" or "badly" in this instance seems easily answered. The court's conclusion that the allegations were false seems entirely justified: and there is nothing to indicate that the law of defamation was here used to stifle legitimate criticism of a key figure in government.

Another defamation case involving a publication with political overtones is African Newspapers of Nigeria Ltd v Coker.[2] Here, two articles published in the Nigerian Tribune urged the removal of the plaintiff from his office as Permanent Secretary in the Ministry of Finance; and did so on the grounds that he was corrupt. The evidence relied

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1. Ibid., at 232.

2. [1973] 1 N.M.L.R. 386.

upon by the defendants at the trial in order to substantiate this allegation derived exclusively from the report of the Saville Tribunal of Enquiry, established by the Military Government in 1966. This report, however, expressly stated that:'"Only one specific allegation of corruption was made against Mr Coker during the course of our inquiry, and this we believe to have been patently false"'. The Saville Report found that the plaintiff had been guilty of 'irregularities' and recommended that his assets be further investigated: for it could not account for certain payments into his bank accounts and there had been a 'general undercurrent of suggestions during the inquiry that the senior officials of the City Council [Mr Coker was then City Treasurer] were corrupt'.[1] This evidence was clearly insufficient to substantiate the allegations of corruption so that prima facie, the court's conclusion was correct and the law of defamation was "well" used to uphold the plaintiff's reputation against unjustified attack. Yet the report of the case nevertheless leaves the reader with the impression that the law of defamation might instead have operated, in this instance, to curtail important criticism of a government official. The investigation which the Saville Tribunal had recommended (and which exonerated the plaintiff in full) was conducted in secret.[2] According to the Nigerian Tribune articles, its campaign to rid Nigeria of corrupt officials had succeeded in some instances, but not in relation to the plaintiff - who (interestingly enough) was a cousin of the Military Governor.[3] On the other hand, "corruption" is a specific and very serious

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1. Ibid., at 394.

2. Ibid., at 387.

3. Ibid., at 389.

allegation and it must be acknowledged that the defendants were unable to substantiate this (though perhaps if the report of the secret inquiry had been available, this would have been easier).

A further politically-oriented decision is that Ohonbamu v Midwest Newspapers Corp and anor[1] where the plaintiff (a senior lecturer in law at Lagos University) claimed damages for defamation arising out of the publication in the Nigerian Observer of an article which criticised corrupt intellectuals - in general - and the plaintiff in particular. The court found the plaintiff's claim proved and awarded him damages of ₦ 2,000 plus costs of ₦ 250.

The question whether the law of defamation operated "well" or "badly" in this instance is complex and the answer is perhaps 'Yes' - in principle; but 'No', - on the particular facts. As regards the affirmative part of the answer, the circumstances underlying publication were that the plaintiff had previously published an article sharply critical of the Federal Military Government's conduct of the civil war against Biafra and calling on the government to redouble its efforts to bring the fighting to a speedy conclusion. It was in response to this that the allegedly defamatory article criticising the plaintiff was published in the Nigerian Observer. In principle it is "good" that the law of defamation was available to the plaintiff to assist him in countering an attack which seemed totally unjustified, especially since the plaintiff (in voicing his criticisms of the Government's conduct of the war) was doing no more[2] than to exercise

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1. [1974] 6 C.C.H.C.J. 763.

2. The court's view of Ohonbamu's article was that 'it was not in good taste'. See ibid., at 782.

the freedom of speech guaranteed him by the Constitution.[1] To this extent, therefore, the law of defamation worked 'well' in upholding the right to voice political dissent, for the plaintiff would feel free (having successfully claimed damages for defamation) to continue with the type of criticism which had provoked the defamatory attack against him; and (his reputation having been restored through the intervention of the court) his future comments would be accorded appropriate respect by those to whom they were addressed.

So far, so good. Unfortunately, however, - on the particular facts of the case - the court seems to have erred on one major point; and this inevitably casts doubt on the correctness of its decision overall. One of the court's main reasons for finding the article criticising Ohonbamu to be defamatory was that it described intellectuals in extremely derogatory terms as, inter alia, 'ambitious, greedy, corrupt, without principles and without ethics'[2] and (in the court's view) made it clear that this description applied also to the plaintiff as one member of the class. Thus, the court stated, with reference to the general criticism of intellectuals: 'It is clear upon a reasonable reading of the passage [in question] that the reference there is to none other than the plaintiff and others like him'.[3] In reaching this conclusion, however, the court appear completely to overlook[4] the disclaimer contained in the article itself that there are, of course, some exceptions to the general rule

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1. This, it may be recalled, guarantees the right to impart ideas and information without interference, and its significance for the law of defamation is further discussed below at p. 587.

2. Supra, at 780.

3. Ibid., at 781.

4. Ibid., at 778, where the defamatory article is reproduced and the words set out below in the text are quoted. No reference whatsoever to this important disclaimer is to be found in the judgment of Adefarasin, Ag. CJ.

regarding the ambition, greed and so forth of intellectuals as a class - and that Dr Ohonbamu is one of these exceptions. The actual passage in the article is worth quoting to make the point quite clear.

> 'When they [the Nigerian intellectuals] wave their certificates, they expect us to decorate them with five rows of medals, bow and worship. But they are like other Nigerian mammals ambitious, greedy, corrupt, without principles and without ethics. They are worse. What this war means to them is a quick return to civilian rule - if the soldiers would do their dirty work for them quickly - so that they may be able to take over with palpable indolence what the Ibos had secured with hard work. I would not say there are no exceptions. Dr. Ohonbamu is one."

It must be acknowledged that this was not the only passage on which the court based its finding that the article was defamatory of the plaintiff. It referred also to the allegation that 'people like Dr Ohonbamu are members of the committee of convinced and dedicated men "who originate materials for dissemination" even of falsehood'.[1] This[2] allegation, in the court's view, was 'bound to bring a man ... into odium, ridicule or contempt in the estimation of right thinking members of the society.[3] With respect, however, the allegation in question seems so vague and so ill-phrased that it may be doubted whether it would indeed have this effect. In addition, the court relied on the reference in the article to Biafra being 'his [i.e., the plaintiff's] Biafra'[4] which the court considered clearly

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1. Ibid., at 775.

2. The order of words is changed slightly in the court's discussion of the passage but the discrepancy is minor and, it is submitted, inconsequential.

3. Ibid., at 780.

4. Ibid., at 780 - 781.

defamatory as it was 'bound to hold out the plaintiff in (sic) ridicule in the eyes of reasonable readers'.[1] The passage which the court had in mind reads as follows:

> 'Dr Ohonbamu complains that the Federal Army was guilty of unpreparedness for a war against his 'biafra'; but our case really was that we conceived no genocide against the Ibos'. 2

With respect, it is doubtful whether this passage, particularly when read in the context of the article as a whole, would have suggested to the ordinary reader that the plaintiff identified himself with the rebel cause - as the court seemed prepared to infer.

In short, then, the evidence on which the court relied for its conclusion that the article was defamatory of the plaintiff seems tenuous in the extreme. To this extent, therefore, the law of defamation operated "badly" for the defendants appear to have been wrongly held liable - and this may well have militated against their future willingness to engage in criticism and debate.

Another case worthy of mention once more in this regard is that of Bakare v Oluwide.[3] It may be recalled that, in this case, the Nigerian Socialist had published an article criticising the life of luxury and ease enjoyed by the opulent Nigerian 'Man of Means' - and had contrasted this with the poverty endured by the majority of the population. The article was general in its terms, but the court was

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1. Ibid., at 781.

2. Ibid., at 775 - 776.

3. [1969] 2 All N.L.R. 324.

nevertheless satisfied that there were sufficient points of similarity between the fictitious 'Man of Means' and the plaintiff to warrant the inference that the article was intended to - and did in fact - refer to him.[1] When it came to considering the 'stings' of the libel, however, (that the plaintiff, inter alia, was funded by the C.I.A. and had 'corruptly pressurised men of power in politics')[2] the court was not satisfied that sufficient evidence of these facts had been adduced in order to substantiate a defence of fair comment. The court's approach seems somewhat harsh against the defendants, however, for it was quick to accept the evidence of factual similarity so as to establish the necessary reference to the plaintiff - and equally quick to assert that the defendants had not adduced sufficient factual evidence to substantiate their comments. The court seems to have taken an unduly narrow approach to what constituted the 'stings' of the libel and to have focused on those allegations which - by their very nature - would be the most difficult to prove. The latter point raises again the question whether the law of defamation strikes the right balance between competing interests and gives sufficient scope to freedom of expression. The gap between rich and poor in the country, the prevalence of corruption and the possibility of abuse of the economic power enjoyed by the wealthy few are all questions of legitimate public concern in Nigeria; and it is disturbing that an article couched in the terms of that in the Bakare case should have been found to be defamatory.

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1. This aspect of the case has previously been discussed at p. 473.

2. See p. 494 above, where this aspect of the decision is discussed in more detail.

On the other hand, account must also be taken of the case of Okon v C.O.R. Advocate Ltd and others.[1] Here the defendants had published, in a newspaper entitled the C.O.R. Advocate, an article alleging, inter alia, that the plaintiff - the principal of the Duke Town Secondary School - had ruined the school and was responsible, through his incompetence as a principal, for its falling educational standards. The facts underlying the publication of these allegations were that the plaintiff was standing as a candidate in forthcoming elections to the Calabar Urban County Council and had previously published an article criticising the C.O.R. State Movement (which was closely linked with the Action Group)[2] and that the defendants were supporters of the party and had published their allegations against the plaintiff's competence as a school principal in retaliation for this and in order to undermine his credibility. Thus, the final paragraph of the article, for example, queried: 'If Mr Bassey Okon cannot manage a small [illegible] Secondary School successfully ..., why has he effrontery to speak of the C.O.R. Leaders slantingly?'[3] The plaintiff's claim for defamation succeeded and the court awarded him damages of £350. The court was satisfied that the article had been actuated by express malice and that the defendants had gone out of their way to attack the plaintiff personally; and, moreover, that they had done so by particularly underhand means through impugning the plaintiff's professional competence. In this instance, the law of defamation clearly worked "well" and provided essential protection against a verbal attack which

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1. (1961) 5 E.N.L.R.21.

2. For a further description of the Action Group, see the section on the History of Nigeria, at p. 82 above.

3. Okon v C.O.R. Advocate Ltd., supra, at 22.

could very seriously have affected the plaintiff's professional career (as there was evidence that some two-thirds of the community had begun to doubt the plaintiff's competence as a school principal as a result of the article).

It follows from this brief description of the cases above that assessment of the impact of the civil law of defamation on freedom of expression is by no means easy. There are instances when the law appears to have worked well;[1] but there are also a number of occasions in which the uncomfortable feeling remains that the canvassing of issues of vital public importance has been stifled through the law of defamation.[2] The main question which emerges from these decisions is whether the law of defamation, as presently constituted, strikes the right balance between competing interests. The law, at present, is heavily weighted against the defendant (and in favour of the plaintiff) in a number of ways. First, the falsity of defamatory allegations is presumed, and - instead - the difficult (and in some circumstances impossible) onus of proving them to be true (so as to be able to rely on the defences of justification or fair comment) lies on the defendant. Secondly, the test of whether particular material is defamatory - or refers to the plaintiff - is objective; and depends (not on the defendant's subjective intent in this regard) but on whether the material - from the viewpoint of the reasonable man - is likely to lower the plaintiff in the estimation of right-minded members of society generally. Thus, as pithily stated in the English case of Cassidy v Daily

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1. As, for example, in the Okon case above and in Awolowo v West African Pilot Ltd., supra, p. 449 - 450.

2. As in Williams v West African Pilot Ltd., supra p. 548; African Newspapers of Nigeria Ltd v Coker, supra p.553; and Bakare v Oluwide, supra, p. 558.

Mirror Newspapers Ltd.[1], 'Liability for libel depends, not on the intention of the defamer, but on the fact of defamation'. Although some steps (arguably inadequate in any event[2]) have been taken to redress this situation, the rule remains in full force and effect throughout the northern states of Nigeria, which comprise the bulk of both area and population within the country.

Thirdly, the law presumes that the plaintiff has suffered damage through the publication; and hence the plaintiff - contrary to the general principle of tort law - is able to succeed in his claim without having to establish what is ordinarily regarded as a fundamental element of liability in delict. There is an exception in the case of slander where 'special damage' must be proved in all but the five enumerated instances in which slander is actionable per se. However, this exception is of little benefit to the printed media; and its significance in the context of radio and television broadcasts is open to some question. Thus, in the southern states of Nigeria, it has been provided by statute that the broadcasting of words (or images) for 'general reception' is to be regarded as 'publication in permanent form'. In the North, where the common law continues to govern, classification as libel or slander depends on whether the material in question is, in fact, read from a written script[3].

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1. [1929] All E.R. 117.
2. See the criticism of the statutory defence of 'unintentional defamation' at p 519 - 520.
3. See the discussion at p 466 - 467 above, and see also Gatley on Libel and Slander, 8th ed., London, 1982, para 147, p 76.

Then there is the vexed question of the liability of distributors of defamatory material. Again, the plaintiff need not prove that the distributor knew of the defamatory material or intended to defame the plaintiff in any way. Instead, the distributor is prima facie liable for 'the fact of defamation' (reiterating the dictum above in Cassidy v Daily Mirror Newspapers Ltd.)[1] unless he can show that he did not know, and did not suspect, that the publication contained such matter; and, further, that his absence of such knowledge was not due to negligence on his part. The discharge of this burden of proof may be impossible in practice and the costs of attempting to do so in litigation may be crippling. The resultant risk - inevitably - is that distributors may refuse to handle controversial publications at all: as graphically demonstrated by Goldsmith v Sperrings Ltd.[2]

It is thus apparent that the civil law of defamation is indeed heavily weighted in the plaintiff's favour. It is submitted that the present balance is unduly restrictive of freedom of expression - and that it is salutary in this regard to note the very different approach that has been applied in the United States of America in recent years.

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1. [1929] All E.R. 117.

2. [1979] 1 W.L.R. 478 (C.A.), discussed at p. 528.

## 6.10. The Contrasting United States' Approach to the Civil Law of Defamation

### 6.10.1. The 'Times v Sullivan' doctrine

The law of libel and slander in the United States of America is derived from the English common law[1] and the elements of defamation (with one vital exception, described below) and of the available defences - as outlined above - are essentially the same.[2] Detailed consideration of the complexities of United States' law on this topic lies outside the scope of this study: but, in one respect at least, the United States' Supreme Court has adopted an approach diametrically different from that pertaining in other common law countries; and this important innovation requires brief consideration.

It will be recalled that, at common law, all that is required to establish liability for defamation in the civil law is proof that the words in question referred to the plaintiff, that they were defamatory and that they were published by the defendant. The law presumes both that the defamatory words were false (and hence that they were published maliciously)[3] and that publication of the libel has caused the plaintiff damage. In essence, therefore defamation at common law may be said to be governed by a rule of "strict liability", and is heavily weighted in the plaintiff's favour.

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1. See Nelson and Teeter, Law of Mass Communications; Freedom and Control of Print and Broadcast Media, 3rd ed., New York, 1978, p 57.

2. See ibid., Chapter 3, for a description of the basic elements of defamation and see Chapter 5 for an analysis of the traditional defences of privilege, fair comment and truth.

3. Hence, under the common law, malice (or express malice) need only be considered if the defendant has succeeded in establishing the defence of fair comment or qualified privilege. At that point, liability for defamation may still be incurred if it can be shown that the publisher was actuated by express malice. See p.532 above.

Since 1964, however, in the United States, the Supreme Court has set its face against this principle. It has done so in recognition of the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'[1] and in acknowledgement of the difficulty (so amply illustrated by the Nigerian cases discussed above) of proving the truth of particular allegations. As stated by the Supreme Court in its watershed decision, '[a]llowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.... Under such a rule, would-be critics ... may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[2]

The Supreme Court accordingly concluded that '[t]he rule thus dampens the vigor and limits the variety of public debate'[3] - and that it should therefore be replaced by a new principle, under which 'a public official [is prohibited] from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false

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1. New York Times Co. v Sullivan, 376 U.S. 254, (1964), at 270. (Cited by Nelson & Teeter, supra, p. 57).

2. New York Times Co v Sullivan, supra, at 279.

3. Ibid.

or not'.[1]

The decision in which this principle was established was New York Times Co. v Sullivan.[2] It arose from the publication in the Times of an 'editorial advertisement'[3] describing the struggle of black students in the South for recognition of their civil rights and the police repression this had evoked.[4] Sullivan, a police Commissioner in the area, claimed - and was awarded - $500,000 for libel on the basis of an Alabama law that "the defendant has no defence as to stated facts unless he can persuade the jury that they were true in all their particulars".[5] The Supreme Court reversed the decision, however, holding that the law was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments[6]".[7]

Stressing that "[c]ases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticise their government'[8] and, further,

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1. Ibid., 279-280.

2. 376 U.S. 254 (1964)

3. The court considered it irrelevant that the statement had been paid for. It was still entitled to constitutional protection - especially as the effect might otherwise be to 'shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities'. Ibid., at 266.

4. For an extensive quotation from the 'since-famous advertisement,titled "Heed Their Rising Voices", 'see Nelson & Teeter, op.cit., pp.93-94.

5. See Nelson & Teeter, op.cit., p. 96.

6. The content and significance of the First and Fourteenth Amendments have previously been discussed at p. 350.

7. See Nelson & Teeter, supra, p. 95.

8. See Nelson & Teeter, ibid. The Supreme Court was here quoting the decision in Sweeney v Patterson, 76 U.S. App. D.C. 23, 128 F. 2d 457 (1952).

that [w]hatever is added to the field of libel is taken from the field of free debate'[1], the Supreme Court held that the factual inaccuracy of some of the statements in the advertisement did not destroy its claim to constitutional protection[2]. It then proceeded to lay down the vitally important principle regarding public officials described above.

The significance of this principle cannot be over-emphasised. Not only did the Supreme Court define 'malice' with reasonable precision[3], but it also established it as a threshold requirement in the plaintiff's claim, thus entitling the publisher to summary judgment if the necessary degree of 'malice' is not prima facie shown[4].

Since 1964, the doctrine of New York Times Co v Sullivan has been extended in two important respects. First, it has been established that the principle applies equally to 'public figures'[5]. Secondly, it has further been held that liability for defamation is not to be

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1. Ibid.

2. It pointed out that '"erroneous statement is inevitable in free debate" and ... it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive"...'. See Nelson & Teeter, ibid.

3. 'Malice was [thus] no longer [to be]... the vague, shifting concept of ancient convenience for judges who had been shocked or angered by words harshly critical of public officials'. See Nelson & Teeter, ibid., p. 97. Hence, it would no longer suffice to show (as in the past) '"evidence of ill-will" on the part of the publisher'; or '"hatred" of the publisher for the defamed'; or '"intent to harm" the defamed'.

4. See Nelson & Teeter, ibid, p. 118. The possibility of obtaining summary judgment at an early stage in the proceedings has great practical importance. It offers the prospect of keeping legal costs to a minimum and hence helps to militate against the self-censorship the media may otherwise be induced to practise.

5. See text below, et seq.

imposed on a 'strict' basis at all,[1] so that even the private individual who claims damages for defamation may succeed only if he can show that the publication was 'negligent'.[2] In addition, limitations have been placed on the award of punitive or exemplary damages,[3] and it has been suggested that the public official or figure test should be replaced by one of 'public interest in the issue' - according to which the express malice requirement would apply to all publications relating to such questions, irrespective of the public or private status of the individuals concerned.[4] Each of these developments warrants brief consideration.

### 6.10.2. Extension of the Times v Sullivan doctrine to public figures.

In 1966, the Supreme Court took up and decided two cases in the same opinion in order to clarify controversy[5] regarding the impact of the Times v Sullivan rule on persons who cannot be considered "public officials" but who are, nevertheless, "public figures" and 'involved

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1. See p. 574 below.

2. See p. 574. The word 'negligence' is here used because it is the requirement most commonly applied - since the Supreme Court's ruling that strict liability was not to be imposed. However, the Supreme Court did not specify what degree of fault was required; and state practice in this regard varies to a considerable extent, as further explained below.

3. See p. 575 below.

4. See p. 572 below.

5. This was particularly acute following the dictum of the Federal Court in Pauling v Globe-Democrat Pub. Co. 362 F.2d 188, (8th Cir. 1966) that a public figure who 'had project[ed] himself into the arena of public controversy ... [and was seeking] to guide public policy ... should have no greater remedy than does his counterpart in public office'. See Nelson & Teeter, op.cit., p. 100.

in issues in which the public has a justified and important interest'.[1] The two cases in question are Associated Press v Walker[2] and Curtis Pub. Co.v Butts.[3] In the former, Walker - a retired United States Army general[4] - was described in an Associated Press dispatch (circulated to member newspapers around the nation) as having encouraged rioters - protesting against the admission of a black student to the University of Mississippi - to use violence; and of having 'personally led a charge against federal marshalls'[5] in the course of the protest. In the latter, Butts - a former athletic director at the University of Georgia - was alleged, in an article in the Saturday Evening Post, to have conspired to "fix" a football game between Georgia and the University of Alabama. Both filed suits for libel and the question arose as to whether they fell within the ambit of the Times v Sullivan rule. Neither was a "public official": but either was, arguably, a "public figure".

Justice Harlan (supported by three others making a total of four[6]) was satisfied that Walker was indeed a "public figure" as he had thrust 'his personality into the "vortex" of an important public

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1. See the opinion of Mr Justice Harlan in Curtis Pub. Co. v Butts, 388 U.S. 130 (1967), at 134. (Cited by Nelson & Teeter, ibid., p. 101).

2. Earlier proceedings in this case, in which the Supreme Court of Texas denied a writ of error in relation to the trial court's award to Walker of damages of $500,000 are reported at 393 S.W. 2d. 671 (Tex. Civ. App. 1965).

3. 388 U.S. 130, (1967). Both cases were considered by the Supreme Court together.

4. He had retired 'after a storm of controversy over his troop-indoctrination program'. See Nelson & Teeter, op.cit., p. 100.

5. Nelson & Teeter, ibid., p. 101.

6. The justices who supported Harlan were Clark, Stewart and Fortas.

controversy'[1], but believed that he should not be subject to the same rule in libel as a "public official". He should, however, be required - in order to recover damages - to show that the publisher had been guilty of 'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers'.[2] In the circumstances, Associated Press had shown no such departure: for the 'news required immediate dissemination,...[t]he Associated Press.... respondent gave every indication of being trustworthy and competent ... and [the dispatch] would not have seemed unreasonable to one familiar with General Walker's prior publicised statements on the underlying controversy'.[3] Accordingly, the plaintiff - having failed to establish the requisite '"severe departure from accepted publishing standards"'[4] - was not entitled to damages.

Chief Justice Warren (supported by two others)[5] agreed with this conclusion: but for a different reason. In his view, the Times v Sullivan requirement of proof of express malice should apply equally to "public figures". He pointed out that distinctions between governmental and private sectors are becoming increasingly blurred and submitted that:

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1. See Nelson & Teeter, ibid.
2. Curtis Pub. Co. v Butts, supra, at 155.
3. Ibid., at 158-159.
4. See Nelson & Teeter, op.cit., p. 102.
5. These were Justices Brennan and White.

> '...differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy'. 1

Moreover, in his view, it was plain that:

> '..."public figures" like "public officials" often play an influential role in ordering society.... [so that] [o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials"'. 2

Chief Justice Warren also strongly criticised the test of "extreme departure" (advocated by Justice Harlan)[3] for its uncertainty and its failure to accord adequate protection to free speech.[4]

Both groups of justices agreed, however, that the 'libel judgment against the Saturday Evening Post should stand'.[5] Justice Harlan (with whom Chief Justice Warren agreed in this regard) pointed out that the story was not "hot news" and that the Post had ignored elementary precautions by relying on the unsupported affidavit of its informant who claimed (through electronic error) to have overheard the telephone conversation in which Butts sold the football secrets to his rival team. In the view of Justice Harlan, this evidenced a

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1. Curtis Pub. Co. v. Butts, at 163.
2. Ibid., at 164.
3. See p. 569 above.
4. Supra, at 163. See also Nelson & Teeter, op.cit., p. 104.
5. Nelson & Teeter, ibid., p. 102.

"severe departure from accepted publishing standards"; whilst in the opinion of Chief Justice Warren, it revealed a "reckless disregard" of whether the statements were false or not.[1]

The Supreme Court was thus agreed on the ultimate resolution of the libel claims, but its underlying reasoning was sharply divergent. Justice Harlan (and three others) believed that the relevant test for public figures is that of "extreme departure" from responsible reporting standards (satisfied in relation to Butts but not vis-a-vis Walker); whilst Chief Justice Warren (and two others) stressed that "public figures" are subject to the same test of "express malice" as "public officials" (and that this test was met in Butt's case but not in Walker's). No majority principle emerges, therefore, from this case, on the important question of the test applicable to "public figures"; but the "extreme departure" formula of Justice Harlan appears to have had considerable impact on subsequent decisions.[2]

### 6.10.3. Amplification of the Times v Sullivan doctrine in Gertz v Robert Welch Inc.

This decision of the Supreme Court must now, however, be read in the light of its subsequent ruling (by a majority of five) that "public officials" and "public figures" are in substantially equivalent positions and should both be subject to the same requirement - that of "express

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1. See ibid., p. 102-103.

2. See ibid., p. 104, where Nelson & Teeter point out: 'Since Justice Harlan's opinion lacked majority support in the Court of nine persons, it cannot be said to have the force of a Court-adopted rule. Yet his standard of "extreme departure" from responsible reporting has had a persistent influence in subsequent decisions'.

malice". This principle was established in the case of Gertz v Robert Welch, Inc.[1] - a landmark decision in a number of respects.

Gertz was a Chicago lawyer, who had been 'retained by a family to bring a civil action against [a policeman] who had shot and killed their son'.[2] He was accused in American Opinion of having been the architect of a "frame-up" of the policeman (as part of a communist conspiracy to discredit local police); and of being a Leninist and a "Communist-fronter".[3] Gertz claimed damages for libel and was successful before the trial court.[4] On appeal to the Seventh Circuit Court of Appeals,[5] however, the judgment was reversed - on the basis that the question is issue was one of "public interest" and that Gertz was accordingly obliged to show "express malice" in order to recover. This judgment was based on a principle previously laid down by three Supreme Court justices in the 1971 decision of Rosenbloom v Metromedia, Inc[9]. Here, Justice Brennan's plurality opinion had stressed that the important criterion was not whether the individual concerned had "public" or "private" status; but rather whether the matter under discussion was

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1. 418 U.S. 323, 94 S.Ct. 2997 (1974).
2. Nelson & Teeter, op.cit., p. 107.
3. Ibid.
4. Ibid. It awarded him damages of $50,000.
5. 471 F. 2d 801 (1972).
6. 403 U.S. 29, 91 S Ct 1811 (1971).

one of general "public interest". If so, debate concerning it should be free and uninhibited - and, in order to promote this, libel claims regarding such questions should be subject to the "express malice" requirement of Times v Sullivan.[1] Gertz, objecting to the application of this principle - which had not been accorded majority support in the Rosenbloom proceedings[2] - appealed to the U.S. Supreme Court.

The Supreme Court (by majority of 5:4) ruled that the "express malice" requirement should not apply to private citizens, like Gertz.[3] It was legitimate to impose it on "public officials" and "public figures" who enjoy 'significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy'.[4] Moreover, those who seek public office or prominence in public affairs[5] must accept the hazards this may entail; and

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1. Justice Brennan declared:
'If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved.... The public's primary interest is in the event.... We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard as to whether the persons involved are famous or anonymous'. Ibid., at 43.

2. See Nelson & Teeter, op.cit., p. 106, who point out that '[l]ower courts accepted th[is] plurality opinion as a ruling'; with the result that very few libel suits (by public or private individuals) were won; and commentators predicted the disappearance of libel suits.

3. The criteria for distinguishing "public" from "private" individuals are discussed further, at p. 577 below; together with the Supreme Court's reasons for concluding that Gerts fell within the "private" category.

4. Gertz v Robert Welch, Inc., supra at 344.

5. Justice Powell, delivering the majority opinion, pointed out that '[h]ypothetically, it [might] be possible for someone to become a public figure through no purposeful action of his own, but [that] the instances of truly involuntary public figures must be exceedingly rare'. See p. 345. Accordingly, both public officials and public figures might legitimately be considered to have 'sought' their special positions.

> '...the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamation'. 1

The private individual, by contrast, has 'relinquished no part of his interest in the protection of his own good name, and consequently ... has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood'.[2]

This did not mean, however, that the private citizen should continue to enjoy the benefit of the common law rule of strict liability (under which the law presumes (inter alia[3]) both the falsehood of defamatory words and malicious intent on the part of the publisher). Instead, the different states 'might set their own standards (adopt laws) imposing liability for defamatory falsehood harming private individuals - "so long as they d[id] not impose liability without fault"'.[4] As for the "fault" required, 'Powell termed it "negligence"'.[5]

Striking a further blow for freedom of expression, Justice Powell further ruled that that 'state laws would not be permitted to provide "recovery of presumed or punitive damages" but only "compensation

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1. Gertz v Robert Welch, Inc., supra, at 345.

2. Ibid.

3. A further aspect of the common law rule - as pointed out by Nelson & Teeter, op.cit., p. 109, is that the law also presumes damage from defamatory words, the only question being the quantum recoverable.

4. Nelson & Teeter, ibid, p. 108, citing the opinion of Justice Powell at 347. The emphasis is as supplied by the authors.

5. Ibid., p. 109. State have, in fact, adopted varying standards - not limited to 'negligence', as further explained at p 579 below.

for actual injury"'.[1] In his view, "presumed"[2] or "punitive"[3] damages were unjustified,[4] except where the plaintiff was able to show the "express malice" of Times v Sullivan.[5] In other instances, damages should be limited to compensation for actual injury; which would, however, include compensation for 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering'[6] - even though these were not easily measurable in precise monetary terms.[7]

Of the four dissentients, three[8] believed that the "negligence" principle in relation to private individuals did not go far enough in

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1. Ibid., p. 109, citing Justice Powell at 349.

2. As pointed out at p 561 above, the common law presumes damage to flow from defamatory words in the form of libel, so that there is no need for the plaintiff to prove this. This is, of course, a considerable derogation from the general principle in tort that the plaintiff must prove all elements of his claim, including the fact that he has suffered loss through the defendant's wrongdoing.

3. Punitive damages are designed to punish the wrongdoer and hence bear no necessary corrolation with the damage caused to the injured party. Indeed, they are invariably - ipso facto - higher than such loss.

4. He pointed out (at 349 - 350) that presumed damages inhibit free speech unduly as do punitive damages which amount to 'private fines levied by civil juries to punish reprehensible conduct' - and which are incompatible with the compensatory purpose underlying the rule that private individuals may recover damages for libel on proof of negligence.

5. See Nelson & Teeter, supra, p. 109.

6. Gertz v Robert Welch, Inc., supra, at 350.

7. See ibid.

8. These were Justices Douglas and Brennan, and Chief Justice Burger.

protecting freedom of expression, and one[1] considered that it went too far in 'scuttling the libel laws of the States in ... wholesale fashion'.[2]

Thus, Justice Douglas repeated his view that the First Amendment bars the imposition of any libel law 'impos[ing] damages for merely discussing public affairs'.[3] Justice Brennan, the author of the plurality opinion in Rosenbloom v Metromedia Inc.[4] reiterated his conviction that the crucial criterion is not the public or private status of the individual, but the "public interest" in the matter under discussion. He also pointed to the dangers of "self-censorship" arising from requiring the media to observe "reasonable care" and warned that limiting damages to "actual injury" was not enough, as the media would still face crippling legal costs in showing that they had not been negligent. The "public interest" principle was accordingly preferable from this viewpoint as well as it would limite the area of potential litigation.[5] Chief Justice Burger expressed a similar view, stressing that the majority decision would inhibit some editors.[6]

By contrast, Justice White objected to the onus placed on the private citizen by the majority decision to prove both "fault" (or negligence)

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1. This was Justice White.
2. Gertz v Robert Welch, Inc., supra, at 370.
3. Ibid, at 360.
4. 403 U.S. 29, 91 S. Ct. 1811 (1971).
5. See Nelson & Teeter, op.cit., p..110.
6. See ibid., p. 111.

on the part of the publisher as well as 'actual damage to reputation resulting from the publication';[1] and considered that the majority decision went too far in curtailing the private individual's capacity to obtain redress for damage to his reputation.[2]

Given the different rules applicable to "public" and "private" individuals (under the majority decision), categorisation becomes a vital issue: and the Supreme Court attempted to formulate some guidelines in this regard. It distinguished between two different types of public figure: first, the public figure 'for all purposes' - being the person who has attained 'general fame or notoriety in community and pervasive involvement in the affairs of society';[3] and, secondly, the public figure 'for a limited range of issues' - being the person who has 'thrust [himself] to the forefront of particular public controversies in order to influence [their] resolution'.[4]

Applying these principles to the particular facts, it was clear that Gertz - although he had been active in community and professional affairs - had not achieved general fame or notoriety, so as to bring him within the first category of public figure. Furthermore, he had done no more, as regards the particular issue, than to fulfill his obligations as legal representative of the family and had not 'thrust himself into the vortex of this public issue'.[5] Accordingly, Gertz

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1. See Gertz v Robert Welch, Inc., supra, at 389-394 for the heart of MR. Justice White's dissent.

2. See Nelson & Teeter, op.cit., p. 111.

3. Gertz v Robert Welch, Inc., at 351.

4. See Nelson & Teeter, supra, citing Gertz, ibid., at 351 - 352.

5. Ibid., at 352.

was not a public figure within the second head - and hence did not have to prove that American Opinion libeled him with express malice.[1]

6.10.4. The application of these tests.

Subsequent decisions have provided a measure of further clarification of the distinction between "public" and "private" status. Thus it is clear that the children of famous parents may themselves be considered as having 'general fame within the community', within the first category of "public figure".[2] It also emerges from this - and other decisions[3] - that an individual may be drawn into public attention (rather than thrusting himself into that position) and still fall within the category of public figure.[4] However, it seems also that '"private figures" do not necessarily lose that status overnight by

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1. The Supreme Court accordingly ordered a new trial.

2. See Meeropol v Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974). The children of Julius and Ethel Rosenberg, who were executed in 1953 for passing national defense information to the Soviet Union, sued for libel against the author (Nizer) of a book describing the parents' trial, and also the children themselves. They were held '[a]s children of famous parents, [to have] ... achieved general fame or notoriety in the community "' (at 34) and hence were obliged to show express malice in order to succeed.

3. See Trans World Accounts, Inc., v Associated Press et al., 425 F. Supp. 814 (N.D. Cal. 1977). Here the Federal Trade Commission had investigated Trans World, found potentially harmful activities by the company, and had published its decision to issue a proposed complaint. The result was that Trans World had been drawn into this particular public controversy, and was a public figure for this limited issue. See Nelson & Teeter, op.cit., pp. 115-116, who point out that it may not be inappropriate to speak of Trans World having been 'drawn into' public controversy 'because the root of the matter was its own activity which the FTC saw as misbehaviour'.

4. See Nelson & Teeter, ibid., and contrast the above two decisions with the circumstances of Exner v American Medical Association et al., 12 Wash. App. 215, 529 P. 2d 863 (1974) where 'Dr Frederick Exner for two decades and more had been "injecting" and "thrusting" himself into the flouridation-of-water controversy through speeches, litigation books and articles' and who therefore constituted a public figure in relation to this question.

sudden media publicity'[1] and that the divorce proceedings of well-known 'socialities' are 'not the sort of "public controversy" referred to in Gertz',[2] so that the individuals involved do not constitute 'public figures'.[3]

It remains to consider the type and extent of the "fault" that must be shown by the private individual - as a threshold requirement[4] - in order to bring a successful claim for libel. The Supreme Court in Gertz's case described the "fault" required as "negligence" - but also made it clear that the different states might adopt varying standards, so long as they did not impose liability without fault. The majority[5] of states have adopted the standard of negligence[6] - which, in general, requires consideraton of whether the publisher has exercised reasonable

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1. See Nelson & Teeter, ibid., at 116, commenting on the case of Troman v Wood, 62 Ill.2d. 184, 340 N.E. 2d 292 (1975) where Mrs Troman became involved in a glare of publicity when a newspaper implied that her home was a gang headquarters. When she sued the newspaper for libel, the court ruled that she retained her private status.

2. Time, Inc v Firestone, 424 U.S. 448, 96 S.Ct. 958 (1976) at 965.

3. Ibid. Here Time magazine had erroneously reported the grounds of divorce granted to Ms Firestone - a member of the "society" elite of Palm Beach; and was sued by her for libel. The Supreme Court ruled that, notwithstanding the publicity which had surrounded the divorce proceedings and the plaintiff's position in the "Palm Beach 400", she did not constitute a public figure within the meaning of Gertz.

4. See Nelson & Teeter, supra, p. 119. Thus the fault requirement must be examined early in the libel proceedings, for unless it can prima facie be shown, the 'defending news media may win summary judgments, precluding trial'.

5. Some, however, have adopted stricter standards, as explained by Nelson & Teeter, ibid., pp. 121-122. For example, New York State requires 'express malice' for private individuals, and Indiana and Colorado have adopted the 'public interest' approach advocated in Rosenbloom v Metromedia, as described at p. 572 above.

6. See Nelson & Teeter, ibid., p. 119.

care in the circumstances.[1] A concrete example of the application of this test is provided by the case of Peagler v Phoenix Newspapers, Inc.[2] where the court made it clear that 'something better than a single, possibly biased source for derogatory remarks about private persons' is required.[3]

It remains to consider the meaning of "express malice" as required by the Times v Sullivan rule. This, according to the Supreme Court definition, may take two forms - reckless disregard for the truth or falsity of the publication, or knowledge that the publication was false.[4]

Concentrating for the moment on the former, the requirement of 'reckless disregard' has been further clarified in a number of cases. In Garrison v Lousiana[5], the accused - who was charged with criminal libel[6] - was a prosecuting attorney in Lousiana and accused a number of judges of laziness and inattention to duty. His conviction was

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1. See Nelson & Teeter, op.cit., p. 121 who point out that the word 'care' has been used in a number of cases: the question being whether the publisher has exercised 'reasonable care' or 'ordinary care' or 'due care'. The American Law Institute's Second Restatement of Torts defines negligence (in ascertaining the truth of allegations) as '"the failure to use that amount of care which a reasonably prudent person would use under like circumstances"'. See Nelson & Teeter, ibid, p. 120.

2. 114 Ariz. 309, 560 P.2d. 1216, 1223 (1977).

3. Nelson & Teeter, supra, p. 120.

4. Ibid., p. 122.

5. 379 U.S. 64, 85 S.Ct. 209 (1964).

6. The Supreme Court confirmed that the fact that the case involved criminal libel was irrelevant. The 'express malice' requirement of Times v Sullivan applied equally to it. See Nelson & Teeter, supra, p. 125. The significance of the decision for the criminal law of defamation is further considered at p. 685 et seq.

reversed by the Supreme Court, which ruled that 'reckless disregard' implies '"[a] high degree of awareness of ... probable falsity on the part of the publisher'[1] and there was no evidence of this in the particular circumstances.

In St. Amant v Thompson,[2] 'St Amant read, in a televised political campaign, [an] accusation by one Albin that Herman Thompson had had money dealings with another man accused of nefarious activities in labor union affairs'.[3] In considering whether St Amant had shown "reckless disregard" for the truth or falsity of the accusation, the Supreme Court warned that mere '[p]rofessions of good faith [would] be unlikely to prove persuasive'[4] but also emphasised that:

> 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication'. 5

The circumstances did not disclose such serious doubts on St Amant's part. Albin had sworn his statement, St Amant had verified portion of it and there was insufficient evidence to show that Albin was generally considered untrustworthy.[6]

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1. Garrison v Lousiana, supra, at 74 and 216 respectively.
2. 390 U.S. 727, 88 S.Ct. 1323 (1968).
3. Nelson & Teeter, op.cit., p. 123.
4. St Amant v Thompson, supra, at 1326.
5. Ibid,, at 1325, emphasis supplied.
6. See Nelson & Teeter, supra p. 124.

Significantly, the Federal Court of Appeals has held that prior verification is not, however, required to negative "reckless disregard". In Washington Post Co v Keogh[1] (where the Washington Post had published a story by columnist Drew Pearson accusing Congressmen of bribe-splitting - without attempting first to verify it), the court pointed out that '[v]erification is a costly process, and the newspaper business is one in which economic survival has become a major problem'.[2] Hence, a requirement of verification would encourage self-censorship - especially amongst 'less established publishers'[3] - and might well spell the end of this particular form of journalism. The court pointed out that 'Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips',[4] and warned that '[verification] would be certain to dry up much of the stream of information that finds its way into their hands'.[5]

It is clear, however, that this cannot be taken as an absolute rule. Thus, for example, in Curtis Publishing Co. v Butts,[6] the fact that the Saturday Evening Post had relied on an unsubstantiated report of a telephone conversation overheard by accident (in relation to a

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1. 125 U.S. App. D.C. 32, 365 F. 2d. 965 (1966).

2. Ibid., at 972.

3. Ibid.

4. Ibid.

5. Ibid.

6. 388 U.S. 130 (1967). It may be recalled (from the description of the case at 568 above) that Butts was alleged to have sold the football secrets of his team to a rival school. The source of the story was an individual (not a columnist, like Pearson in the Washington Post Case) who claimed to have overheard (as a result of electronic error) the telephone conversation in which Butts sold the secrets.

story that was not "hot news") was held (by three Justices of the Supreme Court)[1] to be evidence of "reckless disregard". This shows the difficulty of attempting to lay down any hard-and-fast principle. Inevitably, much will depend on the particular circumstances and rigid rules may in fact prove counter-productive.[2]

The Butts case is one example of "reckless disregard" being found to exist. Another illustration is provided by the case of Snowden v Pearl River Broadcasting Corp.[3] Here, a radio station which ran a live 'phone-in' programme in which it asked all callers to identify themselves-but did not warn them against making defamatory allegations over the air-was held to have evinced "utter recklessness" in this regard. As the Louisiana Appeal Court indignantly declared:

> 'The procedure employed amounted to an invitation to make any statement a listener desired, regardless of how untrue or defamatory it might be,

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1. Only three justices considered that the express malice rule applied to Butts on the basis that Butts was a "public figure" and subject to the same requirement as a "public official". Four of the justices, by contrast, thought that the "express malice" requirement should not be extended to "public figures", but that Butts would nevertheless have to show an "extreme departure" from accepted standards of responsible reporting (which, in the circumstance, he had done). See the discussion at p. 569 et seq and see also Nelson & Teeter, op.cit., pp. 125-126.

2. It is submitted that it is preferable for the courts to remain fully sensitive to all the nuances of "reckless disregard", rather than to lay down strict requirements regarding verification, etc.

3. 251 So.2d.405 (La. App. 1971) one particular caller - who omitted to give his name -accused a particular restaurant of being involved in narcotics. The announcer broke in repeatedly trying to get him to disclose his name, but did not warn him against making defamatory statements nor attempt to cut him short. On the contrary, he 'concluded by thanking the caller when the caller had finished his statement'.

> about any person or establishment, provided only that the declarer identify himself. The announcer's qualifying remarks did not even remotely indicate that unfounded remarks were out of order, or that statements and accusations should be based on personal knowledge, or that mere rumour, speculation, suspicion and hearsay would not be permitted'. 1

The broadcasting station could easily have taken the precaution of taping conversations for transmission only after monitoring; and could, at least, have warned a particular caller that he would be cut off if he did not disclose his name.[2]

"Express malice" may be evidenced not only by "reckless disregard" for the truth of falsity of allegations, but also by publication "with knowledge of their falsity". An illustration of the latter is provided by the case of Dalton v Meister[3] where Meister had described Dalton (a former Assistant Attorney General) as a "gestapo leader" and had accused him of conducting a "smear" campaign against Meister.[4] The Wisconsin Supreme Court found, however, that the boot was on the other foot, for 'the evidence plainly showed a "persistent course of conduct on the part of Meister to 'get Dalton'".[5] The court found that Meister's statements had been made with knowledge of their falsity, and awarded Dalton $150,000 - half in compensatory

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1. Ibid.
2. Ibid., and see p. 583 above.
3. 52 Wis.2d. 173, 188 N.W.2d 494 (1971).
4. See Nelson & Teeter, op.cit., p. 129 for further factual background.
5. Nelson & Teeter, ibid.

and half in punitive damages[1].

Further analysis of decisions in which express malice has been found present lies outside the scope of this study[2]. Reference must, however, be made to an important recent decision of the Supreme Court which may well have the effect of narrowing the protection conferred by the Times v Sullivan rule. The case in question is Herbert v Lando[3], decided in 1979 by a majority of 6:3[4], in which the Supreme Court ruled that 'a public official had a right to request reporters to testify on their "state of mind"'[5] in levelling particular allegations against him or her. This requirement is not only disturbingly intrusive: but also threatens to undermine the principle that the burden of proof (under Times v Sullivan) lies on the public official allegedly defamed to show the requisite malice on the part of the publisher.

Notwithstanding this development, however, or the possible narrowing of the category of public figure evinced by Time, Inc v Firestone[6] (and its successors[7]), it is clear that the approach of the

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1. This case was, of course, decided before Gertz in 1974. Even after Gertz, however, punitive damages could still legitimately have been awarded, since the Supreme Court indicated that restrictions on presumed and punitive damages do not apply to cases where "express malice" is found. See Nelson & Teeter, supra, p 109.

2. For further examples, see Goldwater v Ginzburg, 414 F. 2d 324, (2d Cir. 1969); Indianapolis Newspapers, Inc v Fields, 254 Ind. 219, 259 N.E. 2d 651 (1970) and Morgan v Dun & Bradstreet, Inc., 421 F. 2d 1241 (5th Cir. 1970).

3. 441 U.S. 153 (1979).

4. The majority opinion was written by Mr Justice White, and the dissenters were Justices Brennan, Stewart and Marshall.

5. Abraham, Freedom and the Court, 4th ed., New York, 1982, p 157.

6. 424 U.S. 448, 96 S Ct 958 (1976), discussed above at p 579.

7. See Abraham, supra, p 156 n 17.

United States affords far greater protection to freedom of speech than does the common law in England or Nigeria. If this approach had been followed in Nigeria in cases such as Williams and others v West African Pilot[1] - where the plaintiffs fell clearly in the "public" category - the results may well have been very different. And the benefits for freedom of speech would have been incalculable. At the risk of repitition, may it be reiterated that conduct of the kind alleged in the newspaper (the rigging of elections) is of vital public concern and if there is any evidence at all that this has indeed occurred, this should be brought to public attention. Yet the law of defamation as presently constituted in Nigeria militates against this; for it presumes that defamatory words are false and enables the publisher to escape liability only if he can prove the allegations substantially true. However, proof of truth is often difficult - and is especially so in relation to a "secret plot" of the kind alleged in this case. Far better, therefore, to cast the burden of proof on the public official or figure to show that the publication is motivated by express malice - whether in the form of reckless disregard for the truth or of knowledge of falsity. The opposite approach must inevitably encourage self-censorship by the media - and the public's right to be informed of matters of vital concern must be commensurately curtailed.

It must, of course, be acknowledged that the United States' guarantee of freedom of speech is different from that pertaining in Nigeria. The First Amendment robustly declares that 'Congress shall make no

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1. See p.546 above.

law abridging ... the freedom of speech or of the Press'.[1] It remains, therefore, to consider whether the civil law of defamation, as presently constituted in Nigeria, is in keeping with the guarantee of freedom of expression contained in the Nigerian Bill of Rights, with its substantially different wording.

## 6.11. The Constitutionality of the Civil Law of Defamation.

Under the Nigerian Bill of Rights, enshrined within the 1979 Constitution, 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference' is guaranteed by section 36. This guarantee is not absolute, however, and accordingly does not invalidate any law which is 'reasonably justifiable in a democratic society' in the furtherence of certain interests. The range of permitted derogations is wide, as previously discussed,[2] and the one relevant to the law of defamation is clearly that contained in section 41(1)(b), which upholds the validity of 'any law that is reasonably justifiable in a democratic society ... for the purpose of protecting the rights and freedoms of other persons'. Such rights and freedoms plainly include the right to reputation, untarnished by defamatory publication.

Prima facie, therefore, the civil law of defamation in Nigeria falls within the ambit of the derogations from freedom of expression permitted by s.41. It remains to consider, however, whether the law as presently constituted can be said to be 'reasonably justifiable in a democratic society'.

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1. See the section on the Guarantee of Freedom of Expression at p.206.

2. Ibid.

The words 'reasonably justifiable' provide a somewhat uncertain yardstick for assessment; and section 41(1)(b) is clearly open to interpretation in a number of different ways. It is submitted, however, that the phrase must be strictly interpreted in order to prevent the permitted exceptions from swallowing up the principle. It is further submitted that the present imbalance in the law - with its heavy weighting in the plaintiff's favour - goes beyond what is 'reasonably justifiable in a democratic society' to protect the reputation of others; and that the Nigerian courts should now follow the lead of the United States in abandoning the 'strict liability' principle and imposing upon the plaintiff the burden (which normally applies in the law of tort) of proving all elements of the delict - including the guilty state of mind[1] of the tortfeasor and the damage caused to him by the alleged wrong. In addition, public officials and public figures should be made subject to the threshold requirement of establishing 'express malice' on the part of the alleged defamer: and it should be made clear that 'express malice' connotes knowledge of the falsity of the defamatory material or recklessness as to its truth or falsity. In keeping with the suggested general requirement that liability for defamation is not to be imposed without fault, distributors should no longer be prima facie liable for the publication of defamatory material; and, instead, the onus should lie squarely on the plaintiff to show that the distributor had actual, subjective knowledge of the defamatory matter and hence either intended to defame the plaintiff (or must have been careless as to

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1. Thus it should be shown that the publisher of the defamatory material subjectively intended to defame the plaintiff, or that he was negligent in causing this result.

whether or not this result occurred).

In a nutshell, therefore, freedom of expression requires the correction of the present imbalance in the law of defamation and demands that the plaintiff be made subject to the burden of proof which normally obtains[1] in the law of tort. In the context of public officials and public figures - where the full canvassing of matters related to their public conduct is vital to the effective functioning of democracy - the burden on the plaintiff should be pitched higher, and proof of express malice should be required. The law as presently constituted goes further than is 'reasonably justifiable in a democratic society' to protect reputation; and its emphasis should now be changed in the manner effected in the United States through New York Times Co v Sullivan[2] and Gertz v Robert Welch, Inc.[3]

In conclusion, it is salutary to note that one Nigerian decision already reflects support for this approach - at least in the context of public officials. Thus, in Adedipe v Falaiye,[4] the plaintiff (a member of the Akure District Native Authority Council in Ondo Division) claimed damages of £10,000 from the defendant (a member of the Western House of Assembly) in respect of certain defamatory allegations contained in a letter written by the defendant to the District Authority Council, Akure. The sting of the defamatory passages was that the plaintiff had received £200 as 'dash' from a particular business concern (Finch and Company) 'under the false

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1. Thus, the plaintiff must be able to show all elements of his claim, as emphasised above.

2. 376 U.S. 254 (1964), discussed at p. 564 above.

3. 418 U.S. 323 (1974), discussed at p. 571 above.

4. [1956] W.N.L.R. 54.

pretence that he would influence the Council [of which he was a member] to favour the application of [the] ... Company for [certain] Sawmill and Timber concession[s].[1] The defendant relied upon a 'rolled-up plea' of justification and fair comment which the court found substantiated by the evidence. The court accordingly dismissed the plaintiff's claim, and - in so doing - it emphasised the following important principle:

> '[T]he plaintiff, being a member of the Council, was holding a public office and anyone who undertakes to fill such a public office offers himself to public attack and criticism, and public interest requires that a man's public conduct shall be open to the most searching criticism'. 2

In the light of all that has been said above, it needs no further emphasis that this is the approach which should be followed by all Nigerian courts in future years.

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1. Ibid., at 55.

2. Ibid., at 54.

# CHAPTER SEVEN

## THE CRIMINAL LAW OF DEFAMATION

### 7.1. The significance of the Criminal Law of Defamation

The opening passage of the judgment of Lord Edmund-Davies in Gleaves v Deakin and others[1] (a recent criminal libel case in the United Kingdom) provides a convenient starting point for examination of the significance of the criminal law of defamation. His Lordship pointed out that it is a 'startling state of affairs' (in the view of many) that:

> '[A]ny person who considers, or merely cares to assert, that he has been defamed in writing[2] may, without let or hindrance (unless he be libelled in a newspaper[3]), ignores his civil remedy for damages and institute proceedings for criminal libel so that his alleged defamer may be imprisoned or fined'. 4

The main rationale for prohibiting criminal libel on pain of imprisonment

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1. [1979] 2 All E.R. 497 (H.L.(E)). The facts of the case are described below at p. 626 et seq.

2. In English law, slander (the publication of defamatory matter in transitory form, as discussed at p. 465 above) is not punishable as a crime, as further explained at p. 608 below.

3. Where libel is contained in a newspaper or other periodical, the leave of a judge in chambers in required in order to institute a prosecution against those responsible for publication. This is explained further at p. 604 below. In other cases, however, no leave is required to commence proceedings, as further described at p. 601 et seq.

4. Gleaves v Deakin, supra, at 503.

or other punishment[1] was said, in the early seventeenth century, to be that 'harsh words about another person [might] tend to cause him to seek revenge through violence against the writer, and that such breach of the peace [was] a public evil to be guarded against'.[2] Thus, in the decision of the Star chamber in De Libellis Famosis in 1605, it was stated:

> 'If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends per consequens to quarrels and breaches of the peace, and may be the cause of shedding of blood, and of inconveniences.' 3

In addition, so went the reasoning, 'if the offending words were true, the offense was aggravated, for true defamation would make revenge even more sought after than would a lie, which could be disproved'.[4] This gave rise to the rule 'the greater the truth, the greater the libel', which was modified only in 1843 with the introduction of a statutory defence of justification in Lord Campbell's Act,[5] as further explained below.

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1. In the seventeenth century, the punishment was often mutilation. Thus, Dr Leighton (for example) 'was whipped, had both ears cut off, branded on both cheeks and had his nostrils slit': (1630) 3 St.Tr. 384, cited by J.R. Spencer,'Criminal Libel - A Skeleton in the Cupboard (1)', [1977] Crim.L.R. pp383 - 394, at p. 385, n.9.

2. Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p. 307.

3. 5 Coke 125 (1605), 3 Coke's Reports (Fraser ed., 1826) 254, part 5 - 125a.

4. Nelson & Teeter, supra.

5. Libel Act 1843, 6 & 7 Vict. c. 96, described further at p. 623.

The rationale that powers of criminal prosecution were necessary in order to prevent aggrieved citizens from taking violent measures of reprisal against the maker of defamatory allegations is readily understandable[1] in an age when duels were widely regarded as an appropriate means of avenging verbal insults. Today, however, such reasoning can clearly no longer hold good. It is interesting to note, however, that the result has not been the abolition of the law of criminal libel,[2] but the rejection of any 'rule'[3] that a threat to the public peace is a pre-requisite for the institution of criminal proceedings. Thus, beginning with R v Wicks,[4] and as subsequently confirmed by the Court of Appeal in Goldsmith v Pressdram Ltd[5] and by the House of Lords in Gleaves v Deakin,[6] it has now been made clear that the libel need not be 'of such a character as to be likely to disturb the peace of the community or to provoke a breach of the peace'.[7] The libel must not be trivial: and if it is such as to threaten the peace, then ipso facto it must be regarded as serious. Evidence that it may disturb the general community is no longer, however, a sine qua non to showing

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1. At the same time, it must also be acknowledged that the law of criminal libel provided a convenient vehicle for the suppression of criticism of government, as indicated by the cases in which the law was thus invoked, described at p.594, following.

2. It has, however, been suggested that the law should be reformed in various way, as further discussed below at p.679 et seq.

3. In R v Wicks, [1936]1 All E.R. 384 at 386-387, du Parcq, J., delivering the judgment of the Court of Criminal Appeal, rejected counsel's submission that it was 'incumbent upon' the prosecution to prove the likelihood of a breach of the peace resulting from the libel, stating that the court could find 'no support for this theory in any judgment'.

4. Ibid.

5. [1977] 1 Q.B. 83.

6. Supra, (cited at p 591, n 1).

7. Ibid., at 502, per Viscount Dilhorne.

its serious nature.[1]

This modification in the emphasis of the law is not necessarily to be criticised - even though it may extend the ambit of criminal proceedings - for there are many situations in which p may indeed be salutary in the public interest, even though no element of a threat to public peace arises. Thus, for example, criminal proceedings may be the only effective remedy against 'the writers of anonymous poison-pen letters, the persistent senders of obscene postcards, and paranoids who make a nuisance of themselves by making wild, unfounded complaints about other people to their superiors, their relatives or the police'.[2]

In instances such as those suggested above, the law of criminal defamation appears to offer a much needed protection against abuse. However, it must also be acknowledged that the rules themselves are open to misuse, as illustrated by those instances in which prosecutions have been brought by 'private prosecutors who were mentally unbalanced, or seeking publicity, or pursuing sordid private vendettas'.[3] It is also difficult to avoid the conclusion that the law has been invoked on more than one occasion in the past to 'punish persons who in good faith sought to raise issues of public importance'.[4] The 'classic'[5] example

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1. Ibid., at 505, per Lord Edmund-Davies.

2. Spencer, op.cit., p. 390, who points out that such persons may be mentally deranged and in need of restraint, and may also have no money with which to pay damages.

3. Spencer, ibid., The last mentioned possibility is discussed further at p597 n.1.

4. Ibid., p. 391. Spencer cites five cases in which this appears to have occurred. Only one of these, relating to Cecil Chesterton, is described below; but all make fascinating reading and strongly support the inference.

5. This is the epithet applied to the case by Spencer, ibid.

of this is provided by the prosecution of Cecil Chesterton in 1913 (for publicising what appears to be strong evidence of corruption in negotiations between the government of the day and the English Marconi Company)[1] and which resulted in his being convicted and fined £100.[2]

Prosecution at the instance of the government - rather than the private individual - has become 'very rare indeed';[3] but this provides no guarantee that the law may not be so invoked in the future, as graphically illustrated by the recent prosecutions brought in the United Kingdom at the instance of private citizens. In this regard, it is salutary to remember that, at the very time that a judgment of the Court of Appeal was being read - which asserted that 'it would be "mere moonshine" to suggest that there was any possibility of a charge in the criminal courts for libel'[4] - a private prosecution for libel (in Gleaves v Deakin) was being heard.[5] It is also disturbing to note that a number of earlier cases - which evidence considerable suppression of political criticism - have 'never been disapproved [n]or overruled, and [that] a good deal of bad and oppressive law is still theoretically in existence'[6] - and will continue to apply until modified by statute.[7] Examples of these cases include 'the successful prosecution of Cobbett

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1. See The Trial of Cecil Chesterton, Famous Trials Series, ed. Lord Birkenhead; Maisie Ward, Gilbert Keith Chesterton (1944); and see also the summary of the facts in issue provided by Spencer, ibid. It seems that a number of members of the government, including the Attorney-General, Sir Rufus Isaacs, held shares in the American Marconi Company, 'a closely related concern, [and did so, moveover,] at a substantial undervalue'.

2. Chesterton was unable to justify the innuendoes which he drew from the facts regarding the shareholdings.

3. The prosecution of Chesterton, although it touched on members of the government, was brought not by the Attorney-General himself, but by his brother. Spencer states that the only case of recent origin known to him is the prosecution of Mylius (see The Times, 2 February 1911) for 'publishing in his left-wing newspaper the completely false statement that George V had committed bigamy in 1893': Spencer supra, p. 387.

4. Philip Lewis, ed., Gatley On Libel and Slander, 8th ed., London, 1982, p. 646, para 1591, n 1.

5. Ibid.

6. Spencer, supra, p. 387.

7. Although proposals for legislative reform have been made in the United Kingdom, as further explained below, there is no indication of any such reform being effected in Nigeria.

and Johnson for seditious and defamatory libel contained in their criticisms of government policy in Ireland;[1] ... the prosecution of Hart and White for seditious and defamatory libel by alleging a miscarriage of justice in a murder trial;[2] ... the successful prosecution of Harvey and Chapman for defamatory libel of George IV by publicly questioning his sanity;[3] ... [and the successful prosecution of] Peltier, a French emigré living in England, [for publishing] a scathing attack upon Napoleon',[4] with whom the British Government was then anxious to be on friendly terms.[5] It should also be remembered that - from the viewpoint of a government determined to suppress telling criticism of its policies - the law of criminal libel has the great advantage (over the law of sedition)[6] that successful prosecution no longer requires evidence that the libel would be likely to result in a breach of the peace, and certainly does not demand proof that the accused should have intended to incite his audience to violence, as the law of sedition - in the United Kingdom at least - prescribes.[7]

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1. (1804) 29 St. Tr. 1; (1805) 29 St. Tr. 81.

2. (1808) 30 St. Tr. 1131.

3. (1823) 2 St. Tr., N.S. 1; 2 B. & C. 257.

4. (1803) 28 St. Tr. 530.

5. Spencer, supra, p. 386. The description of the cases above is also derived from Spencer, pp. 385-386.

6. Sedition law is, of course, primarily aimed at curtailing criticism of the government.

7. See the section on Sedition at p. 393 above, where the requirement of 'intent to incite to violence' is described. The point has less force in Nigeria itself, of course, where the law of sedition has, in any event, been interpreted to mean that such intent is not a necessary ingredient of the offence. (See p. 413 above). Should this interpretation of sedition be changed in the future, however, (as has been recommended) then the point would assume equal validity in Nigeria.

In summary, therefore, although it is apparent that the law of criminal defamation has served the public interest in the past (for example, by providing for the punishment of 'poison-pen' writers), it is also open to misuse by, for example, individuals intent on pursuing private vendettas,[1] and has undoubtedly been invoked on occasion to suppress matters of general public concern (such as the corruption allegedly surrounding the Marconi contract)[2] or to silence criticism of government

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1. Spencer, op.cit., p. 390, makes no such submission, but it is certainly arguable that the threat of criminal prosecution was used in this way in Goldsmith v Sperrings Ltd., [1977] 1 W.L.R. 478 (C.A.). Here, following publication in 'Private Eye' of a series of articles sharply critical of the plaintiff and insinuating that he was concerned in some way in three major scandals (the Lucan murder, the Slater Walker collapse and the Poulson/Dan Smith affair), the plaintiff instituted civil proceedings against some 37 distributors of the magazine, on the basis of their prima facie responsibility for 'publicising' these alleged libels. 16 of the distributors settled the plaintiff's claims against them by undertaking never again to distribute 'Private Eye'. It seemed, however, that 12 of the 16 did so only after they had received a thinly veiled hint that, if they did not give this undertaking, criminal prosecution would be instituted against them. (See the judgment of Lord Denning M.R. at 492, where the 'warning' letter is reproduced). It must be acknowledged that the Court of Appeal (by majority, against the strong dissent of Lord Denning M.R.) believed that the plaintiff had done no more than he was entitled to in order to protect his reputation. In the writer's view, however, there is considerable force in Lord Denning M.R.'s dissenting opinion; and it is indeed strongly arguable that the plaintiff abused both the civil law (by issuing some 74 writs "out of the blue", with no warning or prior attempt to reach a rapprochement); and the criminal law (by the threat that criminal prosecution would be brought against the distributors unless they agreed to give an undertaking which - it should be noted - was wider than that which any court of law would have ordered). It seems, thus, that the plaintiff may indeed have been pursuing his own private vendetta against the magazine and that he was determined to 'strangle' it by effectively closing all its avenues of distribution.

2. See again the Chesterton prosecution, described at p. 595 above.

policies. The law accordingly has considerable significance for freedom of expression. This is exacerbated by the fact that it is attended by serious shortcomings, especially as regards the available defences and the ease with which proceedings may be instituted, as further discussed in due course.[1]

## 7.2. The Sources of the Nigerian Criminal Law of Defamation

The criminal law of defamation forms part of the body of common law, equity and statutory rules[2] which have been received into Nigerian law, in the manner previously explained.[3] Furthermore, both the Criminal and Penal Codes (the former applicable in the southern states,

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1. The defences discussed are those of justification, described at p 622 below; and fair comment, discussed at p 631 below. The rules relating to the commencement of proceedings, as recently clarified in English proceedings, are discussed in the following section at p. 601.

2. The statutory rules in question are, in general, those contained in 'statutes of general application in force in England on 1 January 1900', as previously explained in the section on the Sources of Nigerian Law. For further detail, see p. 131.

3. See the description of the reception of English law in the section on the Sources of Nigerian Law at p. 129 et seq.

and the latter in the northern ones, as earlier described)[1] both contain a number of provisions regarding criminal defamation. To the extent that these provisions in the Codes overlap with substantive rules of English law received into Nigeria, they may be taken, in general,[2] to have replaced the English law and to provide complete and authoritative statements of the relevant rules.[3] However, it must also be remembered that, where the provisions are based upon common law principles (as, for example, in the definitions of 'defamation' and 'publication' contained in the Codes[4]), cases interpreting the common law continue to be highly persuasive.[5] Where the Codes are silent on some substantive rule, it must be taken to have been repealed by implication,[6] but

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1. It will be recalled that the history of the Codes and the extent of their territorial application has previously been discussed, both in the section on the Sources of Nigerian Law at p 142 above, and in the preceding section on the Law of Sedition, at p 396 above.

2. See, however, the caveats expressed in this regard in the section on the Sources of Nigerian Law at p. 143 above.

3. See R v Coker, (1927) 8 N.L.R. 7, discussed further at p. 624 below as regards the Criminal Code; and A. Gledhill, The Penal Codes of Northern Nigeria and the Sudan, London and Lagos, 1963, p. 15, as regards the Penal Code.

4. These are discussed in due course, at p. 612 and p 617, respectively.

5. In relation to the Criminal Code, see T. Akintola Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, 3rd ed., London, 1982, p. 7. As regards the Penal Code, decisions of the Indian Courts (interpreting similar provisions of the Indian Penal Code on which the Nigerian statute is based) are likewise persuasive. See Gledhill, supra, p. 20.

6. See R v Coker, supra.

where the point is procedural[1], then the received English law continues to apply.

The relevant provisions of the Criminal Code are contained in sections 373 to 381[2]; and, under the Penal Code, the rules governing defamation (and related offences[3]) are to be found in Chapter XXIII, comprising sections 391 to 395. The provisions of the two Codes, though similar in principle, are considerably different in detail; and it is accordingly interesting to note that (once again) - albeit for quite different reasons[4] - a distinction must be drawn between the laws of northern and southern Nigeria in the context of criminal defamation (as must also be done in the context of defamation as a tort[5]). Again, this raises interesting 'conflict of law' questions. In principle, each Code applies (to the exclusion of the other) to all offences committed within its geographical area of operation[6]. If different elements of an offence are committed in both north and south, then - in general - the area in which the first element is committed determines which Code shall apply

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1. Ibid.

2. The equivalent provisions in the Western States Code are ss. 314 to 332.

3. See p 672 et seq.

4. The Criminal Code, as previously explained in the section on the History of Nigeria, at p 142 above, applied in the whole of Nigeria until 1960 when the Penal Code was introduced in the northern states to cater for their predominantly Muslim population. By contrast, the common law of defamation applies throughout the Federation as part of the body of 'received' English common law; but these common law principles, in so far as they relate to defamation as a tort, have been modified to a considerable extent by the Defamation Laws applicable in Lagos State, and in the western and eastern states (as previously explained at p 463 above). In the northern states, however, no amending legislation has been introduced.

5. See n. 4 above. The result, thus, is that the law of criminal defamation differs between northern and southern states, as does the law of civil defamation. This makes it important to determine which set of rules governs the particular alleged offence, as further explained in the text below.

6. See the section on the Sources of Nigerian Law, at p 142.

to the crime in its entirety[1]. Thus, for example, a newspaper printed in Lagos and distributed in Kano or Kaduna (in the north) would (if it contained defamatory matter) be subject to the criminal law of defamation as provided by the Criminal Code; whilst - in the converse situation of a newspaper published in Kano or Kaduna and distributed in Lagos - the Penal Code provisions would apply. The same rules would seem, in principle, to apply to the broadcast media, the location of the broadcasting station thus determining the applicability of either the Criminal or the Penal Code provisions.

## 7.3. The Commencement of Proceedings for Criminal Defamation

It is noteworthy that, in general,[2] 'no leave is required for the commencement even of a private prosecution for criminal libel'.[3] At one time, it was thought that the criminal law could only be invoked where the libel was of such a nature as to be likely to cause a breach of the peace,[4] but this restriction plainly no longer applies.[5] However, it seems that recourse should not be had to the criminal law unless the defamatory allegation in question is of a serious nature. Thus, in Gleaves v Deakin,[6] the House of Lords stressed that criminal proceedings should not be brought where the libel was merely trivial and (to focus on the judgment of one of their Lordships) it was the

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1. See ss 3 and 4, of Penal Code Law , Cap 89, read with S 1 A of the Criminal Code Act, Cap. 42.

2. An exception is made in relation to libel published in a newspaper, as further explained below.

3. Philip Lewis, ed., Gatley On Libel and Slander, 8th ed., London, 1981, para 1599. p. 650.

4. See the discussion at p. 593.

5. Ibid.

6. [1979] 2 All E.R. 497 (H.L.(E)).

view of Lord Scarman that:

> 'the references in the case law to ... outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential feature of a criminal libel remains, as in the past, the publication of a grave, not trivial, libel'. [1]

In English common law, criminal defamation is triable on indictment: and proceedings for committal provide some safeguard against vexatious prosecution. Thus, in determining whether to commit an accused to trial, an examining magistrate - although not concerned with the question whether the prosecution should have been commenced in the first instance - must consider whether 'there is sufficient evidence to put the accused on trial for the alleged libel'.[2] This involves consideration not only of whether the material is prima facia libellous and of whether the accused is prima facie responsible for its publication,[3] but also requires examination of whether the libel is sufficiently serious to warrant - in the public interest - the committal of the accused to trial. The last-mentioned requirement provides some protection against vexatious prosecution: but there is considerable doubt as to whether its protection is sufficient. The inadequacy of the law in this regard has recently been graphically demonstrated by the case of Gleaves v Deakin,[4] where there appeared

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1. Ibid., at 509.

2. Ibid., at 497.

3. Ibid., at 507 - 508, per Lord Scarman, citing the judgment of Cockburn, C.J., in R v Sir Robert Carden, (1879) 5 Q.B.D. 1 at 6.

4. Supra.

to be considerable truth in the allegations made against the prosecutor and where the need for the intervention of the criminal law to resolve what was essentially a private dispute was open to considerable question. So defective is the law in this regard that three of the Law Lords who gave judgment in the case felt the need to call for reform of the present rule, by introducing the requirement that the leave of the Attorney-General be required for the prosecution of all criminal libels (not merely those contained in newspapers),[1] as further explained in due course.[2]

In Nigeria, however, even this limited safeguard is not available. Under the Criminal Code, the maximum penalty for criminal defamation is imprisonment for two years,[3] and the offence accordingly falls outside the ambit of indictible offences (defined, in s 2(1) of the Criminal Procedure Act,[4] as offences which, 'on conviction, may be punished by a term of imprisonment exceeding two years'[5]). Criminal defamation may accordingly be tried by a court of summary jurisdiction, without the intermediary process of committal - and without any need whatsoever to consider whether there is a public interest in the prosecution. Under the Criminal Procedure Code[6], criminal defamation is triable by a Magistrate of the First Grade;[7] and, again,

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1. The requirement of leave in relation to newspapers is discussed below.
2. See p. 679 below, where various suggested reforms are examined.
3. See p. 676 below, where the penalties for defamation are fully described.
4. Cap 43, (Laws of the Federation of Nigeria and Lagos, 1958).
5. s 2(1), ibid., emphasis supplied.
6. Cap. 30, (Laws of Northern Nigeria, 1963).
7. See s 16, ibid,, read with Appendix A.

there is no need for committal nor for any consequent consideration of the public interest in criminal proceedings being brought (rather than the parties being left to pursue their remedies in the civil courts). The result is thus that criminal prosecution for defamation can be instituted in Nigeria with singular ease - and the only procedural safeguard which exists is that relating to the publishers of newspapers, as further explained below.

By way of exception to the general principle that no leave is required for the institution of a prosecution for criminal defamation, the English Law of Libel Amendment Act 1888[1] introduced the requirement that the leave of a judge in chambers must be obtained before criminal proceedings could be commenced against 'any person responsible for the publication of a newspaper',[2] as defined. Nigerian counterparts of this provision are now to be found in the Newspapers Laws of all states except those in the former Western Region, where the Newspapers Law[3] contains no equivalent provision.

Thus, s 23 of the Newspapers Law[4] applicable in Lagos State provides:

> 'No criminal prosecution shall be commenced against any proprietor, printer, publisher or editor of a newspaper for any libel published therein without the consent of the Attorney-General of the Lagos State'. 5

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1. The relevant provision is contained in s 8.

2. The definition of "newspaper" in this statute is the same as that provided by the Newspaper Libel and Registration Act, 1881. See p 301.

3. Cap 81, Laws of Western Region of Nigeria, 1963.

4. Cap 86, (Laws of the Lagos State of Nigeria, 1973).

5. s. 23, ibid.

6. Newspapers Law (northern states) Cap 80 (Laws of Northern Nigeria, 1963).

A substantially similar provision is contained in s 15 of the Newspapers Law[1] of the northern states; whilst, in the eastern states, the applicable Newspaper Law[2] requires the 'order of a Judge in Chambers' for the commencement of a prosecution for libel against 'any proprietor, publisher, editor or any person responsible for the publication of a newspaper'.[3]

No equivalent provision is to be found in the Newspapers Law applicable in the western states;[4] and it seems, therefore,[5] that s 8 of the English statute continues to apply in this area.

Some guidance as to the criteria to be applied by a judge in chambers (and, presumably, also by the Attorney-General in the Lagos and northern states) in deciding whether to grant leave is provided by the recent English decision of Goldsmith v Pressdram Ltd.[6] Here, Wien, J. declined to lay down any hard and fast principles in this regard, emphasising that the decision is ultimately discretionary. He did, however, also indicate that the following requirements for the grant of leave must be met:

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1. Newspapers Law (northern states), Cap 80, (Laws of Northern Nigeria, 1963).

2. Newspaper Law (eastern states), Cap 86, (Laws of Eastern Nigeria, 1963).

3. See s 17(1), ibid. In terms of s 17(2), such application must be made on notice to the person concerned who must be given an opportunity of being heard against the application.

4. Newspapers Law, (Western states) Cap 81.

5. The continuing efficacy of certain English statutory provisions is further discussed at p. 625 below. In essence, it seems that any procedural rule (as here in issue) which forms part of the body of English law received into Nigeria and which has not been replaced by any local Nigerian enactment continues to apply.

6. [1977] Q.B. 83.

(i) there must be evidence of a clear prima facie case;

(ii) the libel must be 'so serious that it is proper for the criminal law to be involved';[1]

(iii) 'the judge must be satisfied that the public interest requires the institution of criminal proceedings'.[2]

At one point,[3] it seemed clear that the latter criterion would only be satisfied where there was evidence that 'the publication of the libel would tend to disturb the peace and harmony of the community'.[4] More recently, however, in R v Wicks[5] - decided in 1936 - the Court of Criminal Appeal indicated that it may also be met where 'the publication seriously affects the reputation of the person concerned';[6] and in Goldsmith v Pressdram Ltd.,[7] the decision was followed by Wien,J. It seems, therefore, that - in order to obtain the requisite order from a judge in chambers - it is not necessary to provide

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1. Goldsmith v Pressdram Ltd., supra, at 88.

2. Duncan & Neill, op.cit., p. 154.

3. At the end of the nineteenth century: see Duncan & Neill, ibid., and p. 592 et seq.

4. See the direction of Lord Alverstone, C.J. to the grand jury at the Somerset Assizes in 1906, cited in Fraser on Libel and Slander (7th Edition) p. 210 and in Duncan & Neill, ibid., p. 155.

5. [1936] 1 All E.R. 384.

6. The court quoted with approval the leading case of Thorley v Lord Kerry (1812) 4 Taunt. 355 at 364, that any 'imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule' may form the basis for an indictment.

7. Supra.

evidence that the libel in issue is likely to cause a breach of the peace; but that it is nevertheless essential to show its serious nature. Any tendency it has to cause public disturbance will, of course, be relevant to this question and so too (it seems) will 'any public position held by the person defamed'.[1]

Even though it is thus no longer necessary to show that the libel is likely to cause a breach of the peace, the principle that leave must be obtained for the commencement of prosecution and - in particular, the emphasis on whether the public interest requires the intervention of the criminal law - provides a salutary safeguard against vexatious prosecution. Unfortunately, however, the ambit of the statutory provisions is extremely limited. Thus, in the first instance, they apply only to newspapers, as defined;[2] and, accordingly, the requirement of leave does not apply to defamatory material published in books,[3] or through the medium of radio or television. Secondly, the need for leave to prosecute applies only to persons 'responsible for the publication' of newspapers; and does not, therefore, extend (to name but one example) to the author of a newspaper article containing defamatory material.[4]

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1. See Duncan & Neill, op.cit.,pp. 155 - 156, relying on the authority of Goldsmith's case.

2. The definition of "newspaper" provided by the various Newspapers Laws has previously been described at p 307. The same meaning applies in this context except that no saving is made for Government-owned newspapers.

3. Thus, in Gleaves v Deakin, supra, where the defamatory allegations were contained in a paperback novel, the requirement of leave accordingly did not apply.

4. See Duncan & Neill, supra., p. 153.

## 7.4. The Distinction between Libel and Slander

In the civil law of defamation, slander - the publication of defamatory matter in transitory form - is actionable only in limited circumstances, as previously described.[1] In England, the distinction between libel and slander is of vital importance in the criminal as well as the civil law, as only '[t]he publication of written defamatory words is a crime ... [whilst] [o]ral defamation is not a crime, unless it consists of reading out a libel[2] or defamatory words are published in the course of a play,'[3] [4] In Nigeria, however, in the context of criminal defamation, the distinction between libel and slander falls away by virtue of the express provisions of the Codes.

Thus, s 373 of the Criminal Code - in defining 'defamatory matter' states that:

> 'Such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words....'.

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1. See the section on the Civil Law of Defamation, at p. 467.

2. Gatley on Libel and Slander, supra, submits that it is wrong to regard the reading of defamatory matter from a written document into a broadcasting apparatus as slander. See para 147, p. 76, n 37. In the civil law, the problem is solved to some extent by the Defamation Act 1952 and its various Nigerian counterparts. See p 466. This does not assist in the criminal law context, as these statutes do not apply to criminal libel.

3. s 4 Theatres Act 1968.

4. Gatley on Libel and Slander, supra., para 1591, p. 646.

Likewise, in defining defamation, s 391(1) of the Penal Code specifies that the offence may be committed by words 'either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations'. Gledhill explains - as regards the Penal Code - that this provision reflects the view of Macaulay[1] that 'in exempting spoken words from criminal liability, the English law was inconsistent'[2] as there was nothing to show that slander was less potentially harmful than libel.

## 7.5. Reference to the Complainant

The requirement that the defamatory matter in issue must reasonably be understood as referring to the complainant is essentially the same as the parallel element of 'reference to the plaintiff' in civil proceedings. There is, however, one important difference. In civil law, the publication of defamatory material - to be actionable - must relate to a living person. In criminal law, by contrast, defamation of the dead may still be punishable as a crime.[3]

This will only be the case, however, in English common law, if living relatives of the deceased 'can show that the object of the publication was to bring contempt and scandal on them'.[4] In Nigerian law, essentially the same requirement has been given statutory form in the

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1. Macauley was responsible for drafting the Indian Penal Code on which the Nigerian Code (through the Sudanese Code) is modelled.

2. Gledhill, op.cit., p. 686.

3. See Gatley on Libel and Slander, op.cit., para 1594 p. 648.

4. Callender Smith, op.cit., p. 72. See also Gatley, ibid.

Northern Penal Code which explains that:

> 'It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives'. 1

In the Criminal Code, it is stated to be 'immaterial whether at the time of the publication of the defamatory matter, the [complainant] is living or dead' - subject, however, to the proviso that 'no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General of the Federation'[2]. No guidance is provided by the Code as to the criteria to be applied by the latter in deciding such a question. It is submitted by Okonkwo and Naish, however, albeit without full examination of the matter[3], that an offence is committed only where there is proof both of intent to injure the family and of harm to a living relative of the deceased[4].

Whether defamation of a 'class' may constitute a crime is open to a certain degree of question; but the availability of such an action appears to be supported by the balance of authority. Thus, Gatley on Libel and Slander affirms that 'a publication [which] is likely to bring a group into discredit ... may be criminal'[5], but does also

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1. s 391(1), Explanation 1, Penal Code, Cap 89.

2. s 373, Criminal Code, Cap 42.

3. The authors make no mention of the lack of guidance on this point in the Code and appear to assume that the common law requirements continue to hold good.

4. Okonkwo and Naish, op cit, p 280

5. Gatley on Libel and Slander, op cit, para 1594, p. 648.

submit that 'the authorities for this proposition are old, and [that] it is far from clear that if the facts fall short of seditious libel, criminal libel proceedings are now available'[1]. The Law Commission, however, in its Working Paper on Criminal Libel, seems clearly to accept that a class action does indeed obtain in the criminal law[2].

Okonkwo and Naish submit that defamation of a 'class' may indeed be criminal, provided the class is definite: but do so on grounds which are (with respect) somewhat tenuous. They point out that section 18(1) of the Interpretation Act defines 'person' as including 'any company or association or body of persons corporate or unincorporate'; and hence conclude that the offence of defamation can indeed be committed in relation to a class[3]. However, an unincorporated association stands in a very different category from a 'class', as commonly understood in the law of defamation. Notwithstanding the weakness of this particular argument, however, there seems - in principle - no reason why a member of a class may not be defamed by innuendo, as in the civil law of defamation[4].

The Penal Code provides clear authority for the availability of a class action in the northern states of Nigeria. Thus, section 391(1) - which defines defamation - is qualified by Explanation 2, which states:

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1. Ibid, n 21. Here, the authorities alleged to support a class action are examined in some detail; and it is submitted that these are far from clear. Thus, for example, in R v Williams (1822) 5 B & Ald. 595, where a libel on 'the clergy of the diocese of Durham' was in issue, the point contested was whether 'an information would be granted for a "public" libel on the application of an unknown private prosecutor without an affidavit that the libel was false. The argument in favour of the information relied on cases where the libels were on a number of individuals in a public body and the information was granted'. Accordingly, the case does not seem altogether conclusive authority.

2. Criminal Libel, Working Paper No 84, London, 1982, p 158 and p 207.

3. Okonkwo and Naish, op cit, p 280.

4. See p. 475.

> 'It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such'. [1]

Gledhill accordingly submits that, whilst 'it is not defamation to say ... "all lawyers are thieves" ... [since] obviously such [a] sweeping generalisation cannot seriously affect the reputation of any individual member of the class condemned'[2], it may nevertheless give rise to criminal liability to make imputations against a class which is 'narrower and clearly distinguishable'[3]. He further points out, however, that in the latter type of instance - where it may be possible to establish that the imputation affects the complainant personally - the matter should perhaps rather be regarded as falling within the ambit of Explanation 3, which provides for defamation by innuendo[4].

## 7.6. The Meaning of 'Defamatory'

Whereas, in the law of tort, the meaning of 'defamatory matter' is not statutorily defined and has gradually crystallized through the decisions of the courts, in criminal law its meaning is described (though not necessarily to the exclusion of all difficulties in application) in each of the respective Codes.

In the Criminal Code, defamatory matter is defined as 'matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation'[5]. It may be expressed by

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1. s 391(1), Explanation 2, Penal Code, Cap 89, emphasis supplied.
2. Gledhill, op. cit., p 693.
3. Ibid.
4. Ibid., and see also Appendix IV for the text of this Explanation.
5. s 373, Criminal Code, Cap 42.

means of either written or spoken[1] words, or through other sounds or gestures and may be conveyed 'either directly or by insinuation or irony'.[2]

Practical illustration of what does - and does not - constitute defamatory matter is provided by the following cases. In R v Coker,[3] an article was published in a newspaper called Eko Igbehin, alleging that the Alake of Abeokuta had 'marked out [several people] for destruction' and had instigated a number of attempts on their lives. In the court's view, this was so clear-cut an example of defamation that '[i]t [was] hardly necessary to say that the whole passage [was] defamatory'.[4] By contrast, in Arayi v Ojubu,[5] the alleged defamatory statement was that the Olu of Warri had '"ordered that each person should pay £5 flat rate tax and £7 each for the Western Region free compulsory primary education scheme"'.[6] On appeal, the court found that these words, 'without innuendo, were not defamatory of the Olu ... [for] [t]hey could not reasonably be said to expose him to hatred, ridicule or contempt'.[7] As the court in worldly-wise fashion

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1. Ibid.
2. Ibid.
3. (1927) 8 N.L.R.7.
4. Ibid., at 8. This finding of the trial judge was confirmed by the Full Court (at 13 and 15) in considering the case stated for their determination, as discussed at p. 624 below.
5. [1956] W.N.L.R. 145.
6. Ibid.
7. Ibid., at 146.

concluded, they would 'at the very most ... expose him to unpopularity, a fate which, sooner or later, overtakes anyone who is concerned in the imposition or collection of taxes'.[1]

The Penal Code is somewhat differently framed, It begins by defining defamation, in essence, as the making or publication of any imputation concerning any person with intent[2] to harm the reputation of that person.[3] The type of imputation in question is then further explained as being one which

> '...directly or indirectly in the estimation of others lowers the moral or intellectual character of that person or lowers the character of that person in respect of his calling or lowers the credit of that person or causes it to be believed that the body of that person is in a loathsome state or in a state generally considered as disgraceful'. 4

Gledhill points out that '[a]n imputation is only defamatory [in terms of this provision] if it affects [the complainant's] reputation in one of the four ways stated above and [that] whether it has an effect entailing liability must, to some extent, depend on the time and place'.[5] Thus, although it would no longer be defamatory to describe a woman as a witch in England, this is not the case in Northern Nigeria, where it is still an offence to represent oneself as being a witch.[6] Examples of allegations which would be defamatory under the section include charges that another person is a swindler

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1. Ibid., at 147.
2. The relevance of the accused's intention or knowledge is discussed further at p. 659 et seq.
3. S 391(1), Penal Code, Cap 89.
4. Ibid., Explanation 4.
5. Gledhill, op.cit., p. 689.
6. Ibid.

or crook[1], or that he is insane[2], or insolvent[3] or has leprosy or veneral disease[4]. It would also be defamatory to accuse an author of being a plagiarist or a doctor of being a quack[5].

The crucial question which remains for consideration in relation to both Codes is whether defamatory meaning is to be determined on an objective basis - or by reference to the accused's subjective intent. In other words, does liability depend on intent to defame? Or on 'the fact of defamation' - as is clearly the case under the civil law[6]? Neither of the Codes provides any guidance on this point.

As regards the Criminal Code, Aguda points out that the definition of 'defamatory' in s 373 of the Code 'is based on the definition of defamatory libel at common law'[7]. This indicates that no special meaning is to be attached to 'defamatory' under the Code and that it should be accorded its normal common law - and objective[8]- meaning. This inference is strengthened by Gatley on Libel and Slander, in which it is submitted that '[b]roadly speaking[9], the publications which

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1. Ibid. This would tend to lower the complainant's moral character.

2. Ibid. This would tend to undermine his intellectual character.

3. Ibid. This would tend to lower his credit.

4. Ibid. This would tend to indicate that his body was in a loathsome or disgraceful state.

5. Ibid. This would tend to lower the reputation of either the author or the doctor in his calling.

6. See the discussion at p. 561.

7. Aguda, op cit, p 804.

8. As regards the common law, it is noteworthy that the Law Commission in its Working Paper, Criminal Libel, supra, has little doubt but that the offence is one of strict liability (and that this aspect of the law is in singular need of reform, as further explained in due course).

9. The only exceptions here mentioned in Gatley have no relevance as regards the need for mens rea.

are the subject of civil and criminal libel are the same'.[1] This indicates that a defamatory publication such as that in issue in Hulton v Jones[2] could equally found the basis for a criminal prosecution as a civil suit and that - in either instance - the fact that the publisher did not intend to defame the complainant (or plaintiff) would be irrelevant.

As for the Penal Code, Gledhill provides a number of examples (as indicated above) of statements which would be regarded as defamatory within the meaning of a 391(1), as clarified by Explanation 4. Unfortunately, he gives little attention to the question of whether the accused's subjective intent is relevant in this regard. However, all the examples he quotes relate to statements which would clearly satisfy an objective test of defamatory meaning. Moreover, he also asserts (albeit without full consideration of the issue) that:
'In determining whether a statement about another lowers that other's character in any of the ways mentioned in the section, the opinion of the reasonable man, living today, in Northern Nigeria ... must be considered'.[3] Although the point might have been clearer if Gledhill had expressly rejected the relevance of the accused's subjective intent in this regard, it nevertheless seems plain that Gledhill regards the test of defamatory meaning as objective - the crucial criterion being thus the viewpoint of the reasonable man.

Another question of importance concerns the onus of proving the truth or falsity of defamatory allegations. Under the civil law, as

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1. Gatley on Libel and Slander, op.cit., para 1594, p. 648.

2. [1910] A.C. 20 (H.L.(E.)).

3. Gledhill, op.cit., p. 689, emphasis supplied.

previously discussed, the defamatory allegation is presumed to be false and its truth only becomes an issue in the proceedings if the defendant relies on a defence of justification or fair comment. Does the same presumption apply in the criminal law? Again the Codes are silent in this regard - but it would seem (on the same reasoning as above) - that the matter must be determined on common law principles, which draw no distinction between the civil and criminal law of defamation in this respect. Moreover, any doubt on this point would seem to have been eliminated by the decision of the Court of Criminal Appeal in R v Wicks,[1] in which it was declared that:

> 'The falsity of the libel is to be presumed, and, in the absence of a plea of justification, could not be questioned'. [2]

To summarize, these points, it seems thus that an alleged defamatory allegation is presumed to be false under the criminal law, as in the law of tort; and that the question whether the allegation in question is indeed defamatory of the complainant must be determined on an objective basis - taking no account of the accused's subjective intent. To a considerable extent, therefore, the crime of defamation is one of 'strict liability' - a disturbing aspect of the law which is discussed further below in the section on the relevance of mens rea.

It remains to note one point of relatively minor significance. This is the fact that neither definition in the Codes extends to the type of statement that would lead to the complainant being 'shunned' or 'avoided' (through sympathy) by ordinary right-thinking persons

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1. [1936] 1 All E.R. 384. The manner in which the Court approached the question of the accused's acknowledge of the falsity of the defamatory allegations in issue is discussed further below, in the section on the Relevance of Mens Rea, at p. 666.

2. Ibid., at 387.

in society. Accordingly, the ambit of defamatory matter is narrower - in this respect - in the criminal, than in the civil, law.[1]

## 7.7. Publication by the Defendant

There is another important difference between the civil and criminal law in this regard. In the law of tort, publication of the defamatory material to a third person, other than the plaintiff, is essential for a claim to lie. In criminal law, by contrast, at least as regards the Criminal Code,[2] publication to the complainant alone is sufficient to give rise to the commission of the offence. This emerges unambiguously from the clear wording of section 374 which defines publication, inter alia, as 'the speaking of [defamatory] words ... in the hearing of the person defamed;... [or] the delivering [of defamatory matter] with intent that it ... be read ... by the person defamed or by any other person.'[3]

The meaning of the latter provision arose for consideration in R v Arubi,[4] in which the Full Court was asked to rule whether there was sufficient proof of publication in the particular circumstances. The evidence was that the accused had writted the defamatory letter in issue, and that it had been received in the ordinary course of post. This, in the Full Court's view, was 'sufficient to raise the presumption that the appellant posted it'.[5] This, in turn, showed, that he

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1. Contrast civil law cases such as Youssoupoff v Metro-Goldwyn Mayer Pictures Ltd., discussed at p. 476.

2. The Penal Code is less clear, but arguably does require publication to a third person, as discussed below.

3. Criminal Code, Cap 42, emphasis supplied. The full text of this provision is reproduced in Appendix III.

4. (1933) 11 N.L.R. 27.

5. Ibid., at 28.

had 'delivered it with intent that it should be read by the [recipient]';[1] and publication was accordingly proved.

The requirement of 'publication' also arose for consideration in R v Coker[2] where the accused admitted that he had written the defamatory letter "To the Editor" which subsequently appeared in the Eko Igbehin newspaper, but contended that he had left it 'on a shelf in his bedroom when it had mysteriously disappeared'.[3] The court disbelieved this story and held that 'if a person writes a libel which is afterwards printed, this is prima facie evidence at least of a publication of the libel by [him]'.[4]

The Penal Code is significantly different in its wording, and is more difficult to interpret. It contains no definition of publication per se, but instead defines the offence of defamation as, in essence,[5] the mak[ing] or publish[ing]' of 'any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person'.[6] It is difficult to envisage how such intent or knowledge could be proved except where the imputation is made to a third person in whose eyes the reputation

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1. Ibid.

2. (1927) 8 N.L.R. 7.

3. Ibid., at 8.

4. Ibid., The finding that publication was proved was confirmed without hesitation by the Full Court in answering the case stated to it, as described at p. 625 below. Unfortunately, however, the Court made no comment on this ruling of the trial judge, which was based on the authority of Odgers On Libel (4th Ed. p. 625); and did not canvass the question whether reliance should be placed on such presumptions in criminal law, where the onus rests upon the prosecution to prove all elements of the offence beyond reasonable doubt.

5. The full text of this provision, contained in section 391(1) Penal Code, Cap 89, is reproduced in Appendix IV.

6. s. 391(1), ibid.

of the person defamed is commensurately diminished. There are no decided cases in Nigeria on this point, however - and it is, of course, also arguable that the criminal law is primarily concerned with deterring the making of defamatory statements - so that publication to the person defamed alone may be sufficient to incur its penalties. On balance, however - and in view of the clear wording of the Penal Code - it is submitted that, within its area of operation, publication to a third party is indeed required.[1]

It should be noted that the above interpretation of the Penal Code is supported by Gledhill,[2] on the basis of Indian authority.[3] Gledhill thus states:

> 'In every case there must be publication to some third party. The delivery of a dafamatory letter to the person defamed cannot make the person who despatched or delivered it liable, as the statements in it cannot lower the addressee in the estimation of others[4] who were not aware of those statements, but if the same message were sent in a telegram or on a postcard, there is publication to the post office officials who handle them'. [Likewise,] [f]illing a petition and swearing an affidavit containing imputations against another amount to publication[5]'.[6]

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1. Unfortunately, the discussion by Okonkwo and Naish, op.cit., p. 281, is limited to the Criminal Code where the position is quite clearly stated.

2. Op.cit., pp. 686-688.

3. Indian cases interpreting the Indian Penal Code are, of course, persuasive because of the close relationship between the Nigerian and Indian Penal Codes.

4. Abdul Aziz v Syed Md. Arab, A.I.R. [1935] Cal. 736.

5. Abdul Hakim v Tei Charidar, (1881) I.L.R. 3 All. 815; Bhikachand v Emp., A.I.R. [1927] Sind 54.

6. Gledhill, supra, p. 687.

As regards imputations made in a newspaper, 'the publisher [is deemed to have] published it whether he knew of it or not,[1] unless it was done in his absence and without his knowledge and he had bona fide entrusted the management to a competent deputy during his absence'.[2] Furthermore, all that is necessary 'to prove publication is ... to show that a newspaper was delivered in the area over which the court exercises jurisdiction'.[3]

As regards the words 'makes' or 'publishes' in s 391(1), it has (according to Gledhill) been 'consistently held that "makes" is intended to refer to the originator of the imputation and "publishes" to the persons who repeat it'.[4]

Also relevant in this regard, however, is the Defamatory and Offensive Publications Act of 1966,[5] which extends the meaning of 'publication' in particular circumstances. The relevant provision is, with respect, badly phrased and difficult to interpret and is accordingly, for fear of distorting its effect, reproduced in full, as follows:

> 'The National Military Government hereby decrees as follows:
> 1. Sounds where recorded shall, if defamatory, be deemed to be published if reproduced in any place to the hearing of persons other than the person causing it to be reproduced; and in any prosecution, the penal provisions whether of the Criminal Code to the extent of its operation elsewhere than in the Northern

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1. Emp. v McLeod, (1880) I.L.R. 3 All. 342.

2. Ramasami v Lokanada, (1886) I.L.R. 9 Mad. 387.

3. Emp. v Jhabbar Mal, A.I.R. [1928] All. 222.

4. Gledhill, supra, p. 686.

5. s.1, ibid. (Decree) No. 44 of 1966. The Act is extremely short and contains only one other substantial provision, described at p. 678.

> Group of Provinces, or as to the said Northern Group, of the Penal Code shall, in so far as they relate to or purport to define publication of defamatory matter, be construed and have effect subject to this section'. 1

As regards unauthorised publication, an escape from liability, in certain circumstances at least, is provided by s. 380 of the Criminal Code. This relieves the proprietor, editor or publisher (but not the author) from criminal responsibility for the publication of defamatory matter in a periodical (as defined below) on proof[2] 'that such publication took place without his knowledge and without negligence on his part'.[3] '"Periodical" inludes any newspaper, review, magazine, or other writing or print, published periodically'.[4]

There is no counterpart of this saving provision in the Penal Code, though some protection against 'innocent printing'is implicit in s. 394. This provides that printing or engraving any matter, 'knowing or having good reason to believe'[5] that it is defamatory, is punishable by imprisonment for up to two years, or fine (of unspecified amount) or both. The inference from the words underlined is that printing or engraving without such knowledge or reason for belief is not so punishable.

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1. s. 1, ibid.
2. The onus of proving this seems clearly to lie on the proprietor, etc., seeking to avoid criminal responsibility.
3. s 380(2), Criminal Code, Cap 42.
4. s 380(1), ibid.
5. s 394, Penal Code, Cap 89, emphasis supplied.

## 7.8. The Defence of Justification

Both the Criminal and Penal Codes provide that the publication of defamatory matter does not constitute an offence where the following conditions are satisfied: firstly, that the material in issue is true;[1] and, secondly, that its publication is for the public benefit[2] (or public good,[3] in the pharaseology of the Penal Code). The onus lies on the accused to show that both requirements are met.

Thus, s 377 of the Criminal Code provides:

> 'The publication of defamatory matter is not an offence if the publication, is, at the time it is made, for the public benefit, and if the defamatory matter is true'. [4]

The Penal Code, in s 391 states:

> '(2) It is not defamation -
>
> (i) to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published; whether or not it is for the public good is a question of fact' [5]

Both sections, in their brevity, contrast sharply with section 6 of Lord Campbell's Act upon which they are based. Under English common law, the "truth of the libel" was no defence to a prosecution for

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1. s 377, Criminal Code, Cap 42; s. 391(2)(i) Penal Code, Cap 89.
2. s. 377, Criminal Code, ibid.
3. s. 391(2)(i) Penal Code, supra.
4. s. 377, Criminal Code, Cap 42.
5. s. 391(2)(i) Penal Code, Cap 89.

defamation and, indeed, was considered as aggravating the offence so as to justify the imposition of an even higher penalty. Hence the ironic aphorism: "the greater the truth, the greater the libel".[1] The common law was reformed in this regard in 1843 by section 6 of the Libel Act[2] which enabled the accused, from thenceforth, to raise the defence of justification: subject, however, to a number of conditions. Thus, the section provided (in outline) that 'the truth of the matters charged [might] be inquired into'[3] but would only provide a defence if publication were 'for the public benefit'.[4] In addition, the defendant was only entitled to lead evidence of truth if he had previously, in pleading to the indictment or information, alleged the truth of the defamatory material as well as the public benefit in its disclosure and the facts supporting the latter submission. The section further provided that if the defendant was subsequently convicted, it would be 'competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant [was] aggravated or mitigated by the ... plea [of justification]'.[5]

Given the substantial difference in wording between s 6 of the English statute and the Nigerian provisions above, it is a moot question to what extent section 6 has been superceded by the Nigerian legislation.[6] Both Codes were intended to provide a complete

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1. See again the section on the significance of the law of criminal defamation at p. 592.

2. 6 & 7 Vict. c. 96.

3. s 6, Libel Act 1843, ibid.

4. Ibid.

5. Ibid.

6. It will, of course, be recalled that the Criminal Code is intended to be a complete and exhaustive statement of the law on the matters with which it deals. Where the discrepancy is very large, however, (as here) this principle seems somewhat difficult to accept.

and comprehensive statement of the substantive law on the matters within their ambit.[1] Accordingly, it would seem that any substantive element of section 6 which is not reproduced in the Nigerian legislation must be taken to - by implication - to have been repealed.[2] On this basis, it is clear - from the terms of the Nigerian provisions reproduced above - that justification or truth does indeed constitute a defence to a charge of criminal libel - provided, of course, that publication is for the public good or benefit. What is not so clear, however, from the wording of the relevant legislation, is whether the procedural requirement regarding the pleading of justification continues to operate;[3] and whether an unsuccessful plea of justification may lead to increased penalty.[4]

As regards the former problem, however, the matter has been clarified (at least as regards the Criminal Code)by the decision of the Full Court in R v Coker.[5]

The accused in this case was charged with defamation, arising out of the publication in a local newspaper of a letter written by him, alleging that the Alake of Abeokuta was attempting to murder several persons. At his trial, he wished to rely, inter alia, on 'justification'; but had not pleaded this when charged with the offence. The trial judge held that he was precluded by the requirements of s. 6 of

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1. See the section on the Sources of Nigerian Law (in general) at p. 142 above, and the discussion of the sources of the law of criminal defamation at p. 599 above.

2. See R v Coker, (1927) 8 N.L.R. 7, discussed further at p. 625.

3. As discussed below.

4. As discussed at p. 628.

5. Supra

Lord Campbell's Act from bringing evidence to substantiate this defence.[1] The question whether this decision was correct was, together with a number[2] of other issues, referred to the Full Court for its decision.

The substantive requirements of section 6 (the need for proof of truth and public interest) had clearly been replaced by the provisions of s 377 of the Criminal Code. The latter section[3] was silent, however, as regards the procedural requirement relating to the pleading of justification. This omission could be interpreted in two ways. Either the Code (which was intended to be a complete statement of the law) had abolished the requirement; or it was unaffected by the Code and remained in effect as part of an English statute of general application in force on 1 January 1900 in the United Kingdom; and therefore, by virtue of s. 14 of the Supreme Court Ordinance,[4] also in Nigeria.

The Full Court, after careful consideration, concluded that the latter interpretation was correct. It pointed out (per Combe, C.J. ) that the Criminal Code was indeed intended to be a complete statement of the substantive criminal law. Accordingly, any substantive provision of section 6 (such as the requirement that publication be for the public benefit) would - if not incorporated within the Code - have ceased, by implication, to form part of Nigerian law. No such consideration applied, however, to the procedural aspect of section 6.

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1. Ibid., at 12.

2. Two of the other questions - whether he was correct in finding the letter defamatory and in concluding that there was sufficient evidence of its publication by the accused have already been adverted to at p. 613 and 618 above; and the fourth (and last) relating to qualified privilege is discussed at p 649 et seq.

3. So too were all other relevant ordinances. See R v Coker, supra at 13.

4. The general "reception" statutes have previously seen discussed in the section on the Sources of Nigerian Law, at p. 131. The provision specifically in issue here is s 14, Supreme Court Ordinance, Cap 3 (The Laws of Nigeria, 1923).

The Code did not purport to deal with procedural matters - so no particular significance could be attached to the omission of the procedural requirement in s 377. On the contrary, there was nothing to justify the assumption 'that the Legislature intended that the very necessary and proper provisions regarding procedure in section 6 of Lord Campbell's Act should cease to apply in Nigeria because those provisions were not incorporated in the Code'.[1] Maxwell, J., concurred:[2] and so too did Petrides, J., who made the additional point that no equivalent procedural requirement was contained in the Criminal Procedure Ordinance and that, since this Ordinance was not intended to contain a complete exposition of criminal procedure in Nigeria, this was all the more reason for the continued efficacy of a procedural requirement that had undoubtedly formed part of Nigerian Law on 1 January 1900.[3] Thus, the decision of the Full Court, unanimously reached, was that the procedural element of s 6 of Lord Campbell's Act indeed continued to apply, notwithstanding the adoption of the Criminal Code - and that the accused's evidence of justification had therefore rightly been rejected.[4]

The case of R v Coker accordingly provides considerable insight into how harshly this procedural requirement may operate in practice against an accused. A further illustration is provided, inter alia,[5] by the recent House of Lords' decision in Gleaves v Deakin and others.[6]

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1. R v Coker, supra, at 14 per Combe, C.J.
2. Ibid., at 15.
3. Ibid., at 17. See also Criminal Procedure Ordinance, Cap 20 (1923 Laws).
4. Ibid., at 14 and at 17 - 18.
5. See R.v Sir Robert Carden, (1879) 5 Q.B.D. 1.
6. [1979] 2 All E.R. 497 (H.L.(E)).

Here, a private prosecution for criminal libel was instituted by the notorious Roger Gleaves ('the respondent') who had previously been convicted on a number of occasions on charges of buggery and assault [1], against the authors and publishers ('the appellants') of a paperback book entitled 'Johny Go Home' which - so submitted by the respondent Gleaves - contained a number of defamatory allegations against him.[2] When the matter came before an examining justice in proceedings for committal to trial, the appellants sought to lead evidence of the respondent's bad character, in order to show that his 'general reputation was already so bad that the allegations complained of constituted no 'serious' slur on him'[3] and that the trial of the appellants for criminal libel was accordingly unwarranted. The magistrate refused to admit the evidence,[4] however, and this was upheld on appeal to the House of Lords. In a unanimous ruling, the House of Lords stressed that a plea of justification may, under section 6 of the Lord Campbell's Act, be made only at trial, as earlier confirmed in R v Sir Robert Garden.[5] The appellants could not attempt to circumvent this rule by leading evidence of the prosecutor's bad character at the committal stage.[6]

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1. Ibid., at 500, where his various previous convictions are listed.

2. Ibid., at 503, where Lord Edmund-Davies summarises the nature of the allegations made.

3. Ibid.

4. This refusal seems somewhat ironic, in view of the fact that the magistrate had permitted the respondent to be cross-examined on his previous convictions. See ibid., at 500.

5. Supra.

6. See, for example, the judgment of Lord Edmund-Davies, ibid., at 506, where his Lordship expressly endorses the view expressed in the Divisional Court by Lord Widgery, C.J. that,
   '... the consequences would be disastrous if the calling of evidence about the general reputation of the prosecutor could be indulged in in committal proceedings and was not subject to the same restrictions as the case of justification'.

Whilst this decision is clearly correct in terms of the existing law, its practical effect seems equally harsh. Their Lordships accordingly recommended that the law should be reformed in various ways, as further described below.[1]

Thus far, only the continued efficacy of the procedural element of section 6 has examined. More difficulty surrounds the further question whether that part of section 6 which entitles a court to consider whether 'the guilt of the [accused] is aggravated or mitigated' by a plea of justification continues to apply. It was noted by Petrides, J. in R v Coker that the plea of justification is a 'double edged weapon'[2] by reason of its possibly aggravating effect on punishment. This dictum would accordingly indicate that Petrides, J. believed that this part of section 6 does indeed have continuing efficacy. However, his statement was clearly obiter;[3] and it is submitted that there must remain considerable doubt as to the continuing applicability of this part of the section. A provision for increased sentence in certain circumstances is not procedural in nature - unlike the pleading requirement previously discussed. Accordingly, it is strongly arguable that - together with other substantive aspects of section 6 - it ceased to apply in Nigeria on the enactment of the Criminal Code.[4]

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1. See p. 680 et seq.

2. (1927) 8 N.L.R. 7.

3. Note that the decision of the Full Court was that the accused was not entitled - in any event - to rely upon the defence of justification, given his failure to plead it as required. Thus, this plea could clearly not have affected his sentence.

4. See R v Coker, above.

As regards the continued efficacy of section 6 of Lord Campbell's Act in the northern states of Nigeria where the Penal Code applies, it is submitted that the position is substantially the same. Like the Criminal Code, the Penal Code was intended to be a complete and comprehensive statement of the law on the matters within its ambit. Hence, any substantive elements of section 6 not reflected in a 391(2)(i) must be taken no longer to form part of the law; whilst procedural aspects of section 6 are not affected by the provisions of the Penal Code. It follows that the substantive requirements of 'truth' and 'public good' continue to apply, as does the procedural requirement that the accused may only lead evidence of truth if he has indicated his intention of relying on this defence in pleading to the charge. The further substantive aspect of section 6 - that an unsuccessful plea of justification may aggravate punishment - does not however, continue in force, for the reasons explained in relation to the Criminal Code.[1] In this regard, it should also be recalled that the Criminal Code initially applied throughout Nigeria - and was only replaced by the Penal Code in the North at a considerably later date.[2] Accordingly, any substantive provisions of s 6 which ceased to have effect on the enactment of the Criminal Code could not subsequently have been re-introduced into the law save by express legislation to that effect: and the Northern Penal Code contains no such provisions.

As regards the interpretation of the 'justification' provision in the Penal Code, some guidance is provided by the Illustrations appended to the section. Thus, it may be 'for the public good' to reveal that

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1. See p. 628.

2. The Penal Code came into effect only in 1959, as previously discussed in the section on the Sources of Nigerian Law, at p. 141.

a man who opens a new school has recently been involved in dishonest conduct, but this would not be the case where the dishonesty had been perpetrated some twenty years ago, and the man had led an exemplary life in the interim.[1]

Further glosses as to the meaning and ambit of the provision are added by Gledhill.[2] He submits that the onus of establishing this defence (as well as the other exceptions to liability[3]) lies on the accused; and that it is sufficient for him to show that the imputation is substantially true in the sense that 'the departures from the truth are not such as materially to affect the impression made on the mind of the reader or hearer'.[4] Somewhat ambiguously, however, Gledhill further asserts, on the basis of Indian authority,[5] that '[i]f there is doubt about the truth of the imputation, the accused is not entitled to the benefit of the doubt'.[6] It is submitted, however, that this interpretation cuts across established principles of criminal law and should not be followed by the Nigerian courts.

Gledhill defines the 'public good' as 'the good of the general public as opposed to that of the individual; [and as] ... the common convenience and welfare of a considerable section of the public'.[7] He submits, further,

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1. See illustrations (a) and (b) to s. 391(2)(i) and see also Gledhill, op.cit., p. 695.

2. Ibid., pp. 695-696.

3. As further explained in due course in the text below.

4. Gledhill, op.cit., p. 695.

5. Lalmohan Singh v King, A.I.R. [1950] Cal. 339. Indian cases on the Penal Code are, of course, of persuasive authority only.

6. Gledhill, supra.

7. Ibid.

that [t]o proclaim that a man keeps a mistress or is too fond of liquor or is mean in relation to household expenditure, even if true, is unlikely to be for the public good'[1].

Gledhill also points out that the benefit of the defence may be lost if the publication extends beyond what is needed in the public good. He cites in illustration a further Indian decision[2] in which the accused wrote to the secretary of the local municipality advising him that a particular employee of the municipality had been dismissed by two previous employers. Whilst this alone would not have rendered him liable to conviction[3], he had then gone further and had proceeded - before the municipality could take any action - to have the letter published in a local newspaper. It was held that he 'could not claim the benefit of the exception in relation to the publication of his letter in the newspaper'[4].

## 7.9 The Defence of Fair Comment

In neither the Criminal nor Penal Codes is there any provision specifically labelled the 'defence of fair comment'. Instead, sub-sections embracing the elements of this defence are to be found in s. 379 of the Criminal Code (headed 'cases in which publication is conditionally privileged') and in s.391 of the Penal Code (which describes publications which do not - in law - amount to defamation).

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1. Ibid.

2. Q.E. v Janardhan, (1894) I.L.R. 19 Bom. 703.

3. The case, presumably, was decided on the basis of 'justification'. It seems, however, that a defence of 'qualified privilege' based on duty or common interest might equally have been applicable - but would also not have availed the accused, by reason of excessive publication, as further explained below.

4. Gledhill, supra, p. 696.

Thus, the Criminal Code, in the sections relevant to fair comment, provides as follows:

's. 379. The publication of defamatory matter is conditionally privileged, and no person is criminally liable in respect thereof, in the following cases:

(4). If the defamatory matter consists of fair comment on [matters which are absolutely privileged under s 378[1]; or on documents published by, or under the authority of, the President;[2] or on proceedings in court or before other public body or public meeting;[3] or on any information issued by a Government department for the information of the public];[4]

(5) if the defamatory matter consists of fair comment upon the public conduct of any person in public affairs, or upon the public conduct of any person employed in the public service in the discharge of his public duties, or upon the character of any of such persons so far as it appears by such conduct; or

(6) if the defamatory matter consists of fair comment on any published book or other literary production, or any composition or work of art, or performance publicly exhibited, or any other communication made to the public on any subject; or on the character of the author of such book, production, composition, work of art, or the person exhibiting such performance, so far as their characters may appear

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1. See p. 641.

2. See s 379(4), read with s 379(1).

3. See s 379(4), read with s 379(2).

4. See s 379(4), read with s 379(3). The full text of all these provisions is set out in Appendix III.

therefrom respectively...'.

The Code is silent as regards the important question of whether the conditional privilege attaching to fair comment of this kind is lost on proof[1] that the publication was actuated by express malice.[2] s 379 begins by declaring (as noted above) that: 'The publication of defamatory matter is conditionally privileged, and no person is criminally liable in respect thereof, in the ... cases'[3] described above. It seems difficult to accept that this remains the position even where the comment, though fair, was in fact maliciously motivated. Moreover, it is a general principle that 'the law as to the defences of absolute and qualified[4] privilege is the same for criminal libel as for a civil action'.[5] On this basis, fair comment should indeed rank as criminal defamation if actuated by express malice - nothwithstanding the lack of any express provision to this effect in the Criminal Code. As regards onus of proof, it is submitted - both by way of analogy with the civil law,[6] and because of the general principle of criminal law that the burden lies on the state to prove all elements of an offence - that it is for the prosecution to establish that the comment was indeed malicious.

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1. The question of onus of proof of malice is considered further below.

2. For the meaning of express malice, see the discussion, in the context of the civil law of defamation, at p 533 et seq.

3. s 379, Criminal Code, Cap 42, emphasis supplied.

4. It is submitted that qualified and 'conditional' privilege (the term used in the Criminal Code) may legitimately be equated.

5. Duncan & Neill, op.cit., p. 160.

6. It may be recalled from the discussion at p.534 above that, in the civil law, the plaintiff who wishes to rebut a defence of fair comment must file a Reply in which he asserts that the publication was motivated by express malice. At the trial, the onus clearly lies on him to substantiate the allegation of malice.

This interpretation is supported by Aguda[1] who submits - as regards the western states' Criminal Code - that 'if the comment is fair on the face of it, the prosecution must prove malice in order to disprove fair comment'.[2] Unfortunately, however, it is difficult to ascertain the basis for this assertion, since the legislation itself is in exactly the same terms as that previously considered and makes no express reference to malice, its proof or effect. Accordingly, in the absence of definitive pronouncement by the courts, the matter must remain speculative to some degree.[3] The statute is also silent as regards another[4] important question of onus. On whom (defence or prosecution) does the burden lie to show that the the defamatory matter in question does or does not fall within the ambit of s 379(4), (5) or (6)? It might be argued[5] that, since this question is vital to the determination of whether the accused may be held 'criminally liable'[6] at all, the onus must lie upon the state to prove this important element of the offence. On the other hand, however, fair comment provides a defence to liability and it therefore seems more

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1. T. Akinola Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, 3rd ed., London, Sweet & Maxwell, 1982.

2. Ibid., p. 1835.

3. Aguda, ibid., also points out that '[w]here conditional privilege is pleaded under the Legislative Houses (Powers and Privileges) Act, s 27, or, in the Western and Bendel States under the Legislative Houses (Powers and Privileges) Law, s. 21, in respect of an extract from or abstract of any matter published by or under the authority of a Legislative House, the burden of proving bona fides and absence of malice appears to rest on the defence.'

   These provisions, accordingly, would appear to support the counter-contention; and definitive pronouncement on the matter is commensurately more difficult.

4. The question of onus in relation to express malice has previously been considered.

5. Not only in relation to these provisions, but also as regards the sections dealing with justification, absolute privilege and other aspects of 'conditional privilege'.

6. See s 379, as reproduced on p. 632.

logical to conclude that the burden lies on the accused to substantiate it. The onus is clearly on the defence to establish justification, and there seems no reason why a different rule should apply in the context of fair comment. Accordingly, it seems that it is for the accused to show (on a balance of probabilities) that the material in question does indeed fall within the ambit of the statutory protection.

The Penal Code is again somewhat different in its approach and states clearly (in s. 391(2) that '[i]t is not defamation' to make imputation of various kinds. Those relevant to fair comment are as follows:

s 391(2)(ii): The expression 'in good faith' of any opinion whatever 'on the conduct of a public servant in the discharge of his public functions' or on his character as so revealed;

s 391(2)(iii): The expression 'in good faith' of any opinion whatever on 'the conduct of any person touching any public question' and on his character as so revealed;

s 391(2)(v): The similar expression of any opinion on the merits of any civil or criminal case or on the conduct or character of any person involved in such proceedings insofar as revealed by such proceedings;

s 391(2)(vi): The expression, likewise, of any opinion on 'the merits of any performance which its author has submitted to the judgment of the public'[1].

As regards the first of these categories of opinion - 'respecting the conduct of a public servant in the discharge of his public

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1. The full text of these provisions is set out in Appendix IV.

function'[1] a number of illustrations as to its meaning are provided by Indian cases.[2] Thus, the editor[3] of a newspaper was held liable for publishing an article alleging that political prisoners in a temporary camp jail were 'half-starved' and had been brutally beaten when they asked for more bread. It was held that he could not have acted 'in good faith' in publishing, because 'he had accepted the statements of some prisoners, whom he must have known were highly interested parties, without giving the other party any opportunity to rebut them'.[4] In another case, a newspaper editor[5] was also convicted for publicising the prosecution of a particular individual without drawing attention to the fact that the prosecution had subsequently been withdrawn.[6] By contrast, however, the writer of a newspaper article alleging that a particular revenue officer was corrupt and had oppressed certain villagers was found to be protected under this provision because the court was satisfied that he (the writer) had made a proper enquiry and had exercised due care and attention before publishing.[7]

It thus appears that the requirement of good faith 'demands reasonable care in [the] ascertainment of facts'.[8] As regards the opinion

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1. s. 391(2)(ii), Penal Code, Cap 89.

2. These illustrations are cited by Gledhill, op.cit., pp.696-697.

3. The accused was also the publisher and printer of the paper.

4. Gledhill, supra, p. 696, referring to K. Rama Rao v Emp., A.I.R. [1943] Oudh 1.

5. The accused was also the proprietor and publisher of the paper.

6. See Imp. v B.Kakde, (1880) I.L.R. 4 Bomb. 299.

7. See K. Kelu Nair v T.S. Thiramampu, A.I.R. [1948] Mad. 266.

8. Gledhill, supra, p. 697.

itself, and the way in which it is expressed, Gledhill submits that 'regard must be had to the wide diversity of opinions which men can honestly hold on ... many questions and the violence with which they can proclaim them'.[1] Thus, 'whether the court approves the opinion or the manner in which it is expressed is irrelevant; [and] what it has to consider is whether any fair man, however obstinate or prejudiced, would have expressed the opinion complained of an in the form complaind of!.'[2]

It should be noted that protection does not extend to imputations regarding the private life of a public official, nor to expressions of opinion of the character of public officials except insofar as revealed by their official acts. Thus, an allegation that a public servant was a habitual gambler and unfit to hold office would not be protected - unless this was apparent in his official conduct.[3]

The second category concerns fair comment on the 'conduct of any person touching any public question';[4] and is designed to cover the expression, in good faith, of opinion on the conduct of private individuals who concern themselves in matters of public interest by (for example) petitioning the government on an issue of general importance.[5] The requirement of good faith demands the same degree of care in ascertaining facts as pertains to the first category of comment, as

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1. Ibid.,
2. Ibid.
3. See Gledhill, op.cit., p. 697.
4. s 391(2)(iii), Penal Code, Cap 89.
5. See the illustration to this provision.

described above.[1] 'Exaggerated expressions of opinion [do] not [however] prejudice the defence'.[2] Again, only imputations on character as revealed by conduct relating to the particular public question are protected.

An illustration of the operation of the section is provided by the Indian case of Emp. v McLeod.[3] Here, the editor of a medical journal published a comment regarding an appeal to the public for funds, made by a doctor in charge of an eye hospital, and alleged that the doctor had breached professional ethics by the way he had made his appeal. It was held that the editor was protected by this provision as the 'maintenance of the hospital [had been made] a public question and [he] had acted in good faith'.[4]

The third category comprises comment on the merits of cases decided in court or on the conduct of witnesses and others concerned in the proceedings[5] - again with the limitation that imputations on character are protected only to the extent that the particular trait is revealed by the proceedings themselves. Thus, it is legitimate to comment that a witness's evidence is so contradictory that he must be either 'stupid or dishonest';[6] but an allegation that his evidence should not be believed because he is 'a man without veracity' would not be protected.[7] Again, the comment must be made with due care and

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1. See p. 636 above.
2. Murlidhar v Natayendas, A.I.R. [1914] Sind. 85.
3. (1880) I.L.R. 3 All. 342.
4. Gledhill, supra, p. 698.
5. See s 391(2)(v), Penal Code, Cap 89.
6. s 391(2)(v), Penal Code, Cap 89, illustration (a).
7. Ibid.

attention and information must not be suppressed or distorted in order to support the comment.

As regards comment on the merits of cases, it is 'legitimate to point out that there ha[ve] been errors in law or procedure or that the law ha[s] been misunderstood or misapplied or that a law which produced ... a [particular] result is in need of amendment'.[2] Comment on the conduct or character of the presiding judicial officer is not specifically referred to in the provision and, accordingly, is protected only to the extent that it constitutes comment on the merits of a case. Thus, an allegation that a magistrate committed an accused for trial on insufficient evidence is protected (as comment on the merits) but not so an insinuation that 'the magistrate had acted from improper motives'.[3]

The final category concerns comment on the merits of public performance,[4] and covers the expression of opinion on 'literary compositions, works of art, theatrical and musical performances, and public lectures and speeches'.[5] Submission to the public in general rather than to personal friends or a private audience is required. The comment must be fair, in the sense that 'it must be a possible inference from the work itself'[6] and must be made with 'due care and attention ... [having

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1. Ibid.
2. Gledhill, op.cit., p. 700.
3. Ibid., p. 701.
4. See s 391(2)(vi), Penal Code, Cap 89.
5. Ibid.
6. Ibid., p. 702.

regard] to the general circumstances and the capacity and intelligence of the accused'.[1] Any evidence of bad faith or of 'recklessness in making unconscionable assertions'[2] takes the comment beyond the protection of the provision. An amusing illustration of this is provided by the English case of Whistler, in which Ruskin, commenting on an exhibition of paintings, wrote:

> 'for Mr. Whistler's sake, no less than for the protection of the public, works ought not to have been admitted in which the ill-educated conceit of the artist so nearly approaches the aspect of wilful imposture. I have known much of cockney impudence but never expected to hear a coxcomb ask two hundred guineas for throwing a pot of paint in the public's face'. 3

Although the language used was generally interperate, 'it was only the expression "wilful imposture" which took the passage beyond the boundary of fair comment'.[4]

Disparagement of character is protected only to the extent that such character is revealed in the work itself. It is legitimate, thus, to allege that a book is foolish and its author therefore a 'silly man'; but not to assert that the author is known, in general, to be a fool.[5] Thus, in the Indian decision of Emp. v Abdool Wadood,[6] the allegation that the writer of a particular pamphlet was 'on account of his worldly habits, unfit to give counsel as a mufti or qadi

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1. Ibid.
2. Ibid.
3. Whistler, (1878), cited by Gledhill, op.cit., p. 702.
4. Gledhill, ibid.
5. S. 391(2)(vi), Penal Code, Cap 89, illustration (d)
6. (1907) I.L.R. 31 Bom. 293.

and that he had an inborn habit of deception'[1] was held to fall outside the statutory protection because it was general in nature and was not based on the content of the pamphlet itself.

## 7.10. The Defence of Absolute Privilege

The Criminal Code expressly states that certain publications are 'absolutely privileged' so that 'no person is criminally liable in respect [of them]'.[2] The material entitled to absolute privilege is, briefly, as follows:

s. 378(1): Matter published by, or at the order of, the President or a Governor , or in any official document or Gazette;

s. 378(2): Publications in petitions to the President or a Governor;

s. 378(3): Publications which take place in any court proceedings or inquiry authorised, inter alia, by the President or a Governor;

s. 378(4): Publications in official reports made pursuant to such inquiries;

s. 378(5): Publications relating to the military disciplining of a person subject to such discipline by others entitled to wield such discipline over him.[3]

The Code contains no guidance on the question of onus, but (again) it seems reasonable to infer that the burden of proving that the

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1. Gledhill, supra, pp. 701-702.

2. This is substantially similar to the position in civil proceedings, as discussed at p.500 above, in the sense that 'absolute' privilege excludes all liability - irrespective of malice.

3. s. 378, Criminal Code, Cap 42. The full text of these provisions is set out in Appendix III.

publication in issue falls within the ambit of one of these sub-sections lies upon the accused.

As regards the Penal Code, it is somewhat surprising to note that it contains no provisions equivalent to the above. Since the Code is intended to operate as a complete statement of the law in the areas covered by it, it would seem (therefore) that defamatory publications of the kind protected under s 378 of the Criminal Code may, if published in the northern states, give rise to prosecution in respect of which no defence under the Penal Code will be available. If this interpretation is correct, the consequences for freedom of testimony in court proceedings in the North (to take but one example) are potentially extremely serious.[1]

A further disconcerting omission from the Criminal and, a fortiori, also from the Penal Code, is the absence of any provision for 'parliamentary privilege', to protect statements made in the course of parliamentary proceedings, as well as in reports of such proceedings (or in other papers published at the order of the legislature[2]). In the United Kingdom, the matter is clearly covered by the common law, which, as earlier stated, is essentially the same 'as to the defences of ... privilege ... for criminal libel as for a civil action'.[3]

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1. Statements which are fair comment on the testimony of witnesses are protected under s 391(2)(v), as previously described, but this does not protect the witness himself. Protection is, however, afforded to statements made in furtherance of interest under s 391(2)(ix), as further described at 652 below, and this subsection is generally seen as covering statements by counsel, witnesses, and so forth in proceedings. The most important gap is therefore arguably in relation to statements in (and reports of) parliamentary proceedings, as further explained below.

2. See p. 501 above, where the privilege which pertains to such statements in the civil law of defamation is described.

3. See p. 633 above, citing Duncan & Neill, op cit, p 160.

In Nigeria, however, the introduction of the Codes has created a very different situation, and it is strongly arguable (following the reasoning of R v Coker[1]) that substantive rules of the common law which have not been reproduced in the Codes no longer form part of Nigerian law.

Unfortunately, there are no reported Nigerian cases in which this difficulty has been discussed, let alone resolved. If this lacuna in the law indeed exists (as undoubtedly appears to be the case) then legislation would seem necessary to remedy the defect. It is not safe to assume - from the absence of prosecutions in this context in the past[2] - that criminal proceedings may not at some future time be instituted to penalise the maker (or reporter) of a defamatory statement in the course of parliamentary proceedings. So long as this possibility remains, so too does the danger to freedom of expression and (by implication) the risk to the effective functioning of the legislature.

## 7.11. The Defence of Qualified Privilege[3]

In the section on defamation in the law of tort, this defence was discussed in the context of various sub-headings - such as statements in pursuance of duty, protection of interest, and so forth - and it

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1. (1927) 8 N.L.R. 7, especially at 14.

2. Recent criminal libel prosecutions in the United Kingdom, such as Gleaves v Deakin and others, [1979] 2 All E.R.497,(H.L.(E.)), discussed at p.595 above, graphically illustrate the possibility of laws previously considered of academic interest being given a new practical significance.

3. This heading is used, rather than 'conditional' privilege (as in s 378 of the Criminal Code) because the matters here discussed are paralleled (to a considerable extent) by the rules governing 'qualified privilege' in the law of tort.

is proposed to analyse the various provisions of the Codes by reference to the same categories. These are as follows:

(i) Statements in pursuance of legal, social or moral duty.

The provisions of the Criminal Code relevant to this category are as follows:

s. 379(3): This, in essence, confers 'conditional' privilege (thus negating criminal liability) on publications made 'for the information of the public at the request of any Government department or peace officer' or on notices or reports issued by such authorities for public information. The privilege will only lie, however, 'if in every such case the publication is made without ill-will to the person defamed'.[1]

s. 379(8): This relates to publications made, in good faith, by a person with lawful authority over another in order to censure the latter on matters within the ambit of the authority. No express requirement regarding the lack of 'ill-will' is made in the sub-section[2] but the proviso to section 379 makes it clear that the privilege will only obtain where 'the person making the publication honestly believes the matter published to be true, the matter published is

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1. This requirement is found in only three subsections of s. 379. If the term 'conditionally privileged' implies, as discussed at p. 633. above, that the privilege is lost in the face of malice, then this provision is, strictly, tautologous.

2. The 'ill-will' requirement is found in sub-sections (1), (2) and (3) only. For the full text of these provisions, see Appendix III.

relevant to the matters the existence of which may excuse the publication of defamatory matter, and the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion'.[1]

The relevant provisions of the Penal Code are the following:

s. 391(2)(vii): This relates to publications in good faith to censure a person over whom the publisher has authority;

s. 391(2)(viii):This covers accusations, in good faith, against any person 'to any of those who have lawful authority over that person with respect to the subject matter of the accusation';

s. 391(2)(ix): This extends to imputations on the character of others, provided they are made in good faith for the protection of the publisher or any other person or the public good;[2]

2. 391(2)(x): This protects the conveyance of a 'caution in good faith to one person against another', provided it is intended for the good of the recipient (or some person in whom the latter is interested) or for the public good.[3]

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1. The same proviso applies also to subsections (7), (9) and (10), as discussed in due course.

2. This type of publication falls also within the ambit of statements pursuant to interest (and would do so exclusively were it not for the final provision in terms of 'the public good').

3. Ibid.
The full text of these provisions is set out in Appendix IV.

Publications which satisfy these criteria do not constitute defamation, in terms of the opening of s. 391(2).

Guidance as to the meaning of these provisions in the Penal Code is provided by a number of illustrations to each sub-section. Thus, as regards censure in good faith by a person who has lawful authority over another,[1] it is legitimate for a magistrate or alkali to censure the conduct of a witness or officer of court; or for a head of department to censure those under his orders; for a parent to censure a child in the presence of other children; or for a master to censure his servant for inefficiency in service.[2] The requirement of good faith demands that there must be reasonable grounds for uttering the censure; that it must not be made recklessly or maliciously; and that its publication must be no wider than necessary.[3]

As for accusations preferred in good faith to authorised persons, this category would cover 'a complaint made to a magistrate, a report made to the police, [and] a complaint made about a servant to his master ... [or] about a child to its father'.[4] There must be reasonable grounds for making the complaint;[5] it must be limited to matters within the range of authority of the recipient;[6] and publication must

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1. s 391(2)(vii) Penal Code, Cap 89.

2. See illustrations to this provision, ibid.

3. See Gledhill, op.cit., pp. 702-703. As regards the latter point, if the censure were sent in a postcard or telegram, the statutory protection would be lost, as illustrated by Basumati v Budram, (1894) I.L.R. 22, Cal. 46.

4. See Gledhill, supra, p. 704. Good faith would be especially necessary where the complaint was made to a magistrate, as this would be particularly serious.

5. See Gledhill, supra, p. 704. This would be especially necessary where the complaint was made to a magistrate, as this would be particularly serious.

6. Gledhill, ibid., citing Singaraju, (1895) 1 Weir 612.

be limited to what is appropriate to the occasion.[1] The exception is well illustrated by the case of Poona v K.E.[2] in which a number of 'paddy traders complained to the traffic manager of the Burma Railways that a certain station master [had given] preference to charcoal dealers in [allotting] waggons'.[3] Although this allegation proved, on inquiry, to be untrue they were nevertheless held entitled (in proceedings for defamation brought by the traffic manager in question) to the benefit of the exception because, 'at the time when the complaint was made, they had good grounds to believe their allegations to be true'.[4]

The third of the categories listed above - that provided by s 391(2)(ix) - is broad enough to cover statements in pursuance of duty as well as those in furtherance of interest.[5] Examples of the latter are accordingly discussed below.[6] An illustration of an imputation on character pursuant to duty is provided by the Code itself which states that a District Officer who casts aspersions upon a particular individual in making a report to his superior officer will be protected provided he acts in good faith.[7] Gledhill makes the

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1. Gledhill, ibid., p. 705, Thus, there is no protection under this exception for a complaint regarding a servant made not to his master but published in a newspaper.

2. (1916) 8 L.B.R. 440.

3. Gledhill, supra.

4. Ibid.

5. It must be acknowledged that it is not only this exception, but the other three listed above as well, which seem to overlap both 'duty' and 'interest' and cannot, therefore, be easily or entirely satisfactorily slotted into either category.

6. See p. 648 below.

7. s 391(2)(ix) Penal Code Cap 89, illustration (b).

general observation that whilst '[t]he first exception[1] protects true statements published for the public good ... this exception extends to statements which, though not true, are made in good faith for the public good, [which means] the common welfare or convenience of the public or a considerable section of it'.[2]

The final category, relating to the conveyance of a caution intended for the good of the recipient or the general public good,[3] extends (for example) to the issue by a trade association to its members of a list of prospective customers it does not consider trustworthy; but would not protect the publication of such a list in a local newspaper.[4] Thus, publication must not go beyond what is necessary, and the requirements of due care and attention must also be satisfied.

(ii) Statements in protection or furtherance of interest.

The following provisions of the Criminal Code fall within this category:

s. 379(7): This covers publication, in good faith, seeking remedy or redress for any wrong or grievance from a person having (or reasonably believed to have) the right to effect such remedy or redress.

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1. i.e. s 391(2)(1)(i), relating to 'justification', discussed at pp. 622 - 628; and reproduced at p. 622 above.
2. Gledhill, op.cit., p. 705.
3. s 391(2)(x), Penal Code, Cap 89.
4. See Gledhill, supra, p. 710.
5. Ibid.

s. 379(11): This confers protection where defamatory matter is published in answer to an inquiry provided the inquirer is believed, on reasonable grounds, to have 'an interest in knowing the truth' and the information is given in good faith:

s. 379(12): This extends to defamatory publications consisting of information in relation to which the publisher believes (on reasonable grounds) the recipient has an interest in knowing the truth.[1]

In addition, publications within the ambit of subsections (7) and (11) are protected only if three further conditions are satisfied. These have already been set out in full at p 644[2]; and - in essence - they demand honest belief that the matter published is true, that the matter published be relevant to the interest giving rise to the privilege and that the 'manner and extent' of publication go no further than is 'reasonably sufficient'.[3]

As for publications within sub-section (12), the additional requirements for protection against liability are that the defamatory matter must be relevant to the subject and, further, must either be true or 'made without ill-will to the person defamed and in the honest belief, on reasonable grounds, that it is true'.[4]

Attempted reliance on sub-section (7) and (12) is illustrated by the case of R v Coker[1] where, it may be recalled, the defamatory publication

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1. For the full text of these provisions, see Appendix III.
2. See pp 644 - 645.
3. For the full text of these provisions, see Appendix III.
4. Ibid.
5. (1927) 8 N.L.R. 7.

in issue alleged that the Alake of Abeokuta was attempting to murder several people. The author of the publication was one of his alleged intended victims. When prosecuted for criminal libel, he raised the defence that the publication was protected under either subsection (7) (relating to the seeking of redress from a person having - or reasonably believed to have - the right to provide it) or subsection (12), (regarding the publication of information in relation to which the recipient has an interest in knowing the truth). The publication had, in fact, taken the form of a letter to the editor of the Eko Igbehin newspaper.

The trial court's response to this defence was sharply dismissive, Tew, J. stating that he was 'unable to understand' how 'the publication in a newspaper of rumours to the effect that some person is intending to murder other persons can be said to fulfil any of the conditions laid down in either of the [subsections] quoted above'.[1] On reference to the Full Court, this conclusion was unanimously confirmed.[2] The Full Court also endorsed the ruling of the court a quo that evidence of the truth of the rumours - for the purpose of showing honest belief in the truth of the defamatory matter (as required by the provisos to subsections (7) and (12) - was irrelevant and therefore inadmissible in view of the fact that the primary criteria contained in the sub-sections had not been met. As succinctly stated by Petrides J., '[t]he defendant having failed to prove that the publication of the defamatory matter complained of was conditionally privileged, it follow[ed] that evidence could not be tendered under a plea of conditional privilege that the defendant honestly believed

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1. Ibid., at 9.

2. Ibid., at 15, per Combe, C.J.: and at 15 per Maxwell, J., and at 16 per Petrides, J.

it to be true'.[1]

As regards the Northern Penal Code, the provisions relevant to publication pursuant to interest are as follows:

s. 391(2) (ix): This covers the making of an imputation against the character of another, provided it is made in good faith for the protection of the interests of the publisher, or any other person, or for the public good.

s. 391(2)(x): This confers protection where a caution is conveyed in good faith to another either for his own good, or that of some person in whom he is interested, or for the public good.[2]

In such instances, the publication does not amount to defamation.[3]

It remains to examine in further detail the statutory protection given (under s 391(2)(ix))[4] to statements made in furtherance of interest. Since every man has an interest in his own property, a statement made to protect such interest (such as a warning by a shopkeeper to his assistant to sell nothing on credit to a particular customer, as the latter is not trustworthy) is prima facie within the statutory exception.[5] Further, where a litigant, in support of an application for transfer of proceedings to another court, alleges that a named individual, friendly with the presiding magistrate, has been

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1. Ibid., at 16.

2. For the full text of these provisions, see Appendix IV. These sub-sections are, of course, also relevant to statements pursuant to duty (by virtue of the provision 'for public good'. Accordingly they have also been included in that category, at p.645.

3. This, of course, is in terms of the opening words of s. 391(2).

4. This section has already been considered to some extent at p.646 above.

5. s. 391(2)(ix), Penal Code Cap 89, illustration (a).

attempting to interfere in the proceedings, this statement is protected because 'made for the protection of his interest in the case'.[1] It is clear, however, that the statement must be limited to what is necessary to protect the interest in issue and must not include extraneous defamatory allegations.[2]

In addition, publication must not extend beyond what is appropriate to the interest concerned, as illustrated by the case of Vanayak v Shantaram.[3] Thus, the publication in a newspaper of the decision of a secret sect not to admit a particular individual to its meetings in future was not entitled to the benefit of the exception since the 'publication of [this decision] to the general public went beyond what was necessary for the protection of the interest of the sect'.[4]

The main significance of this exception in practice lies in the fact that it provides the basis for protecting statements made in the course of judicial proceedings by judges, counsel, parties or witnesses. In England, such statements are absolutely privileged and this is also the position in those parts of Nigeria (the southern states) in which the Criminal Code applies.[5] In the North, however, (as in India) 'such statements are only entitled to such protection as the Code affords',[6] as further discussed below.

It should be noted that '[w]hen any statement made in court by a judge, counsel, party or witness is made the basis of a charge of

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1. Gledhill, op.cit., p. 708, citing Aravamuda v Sahthana Krishana Krishnan, A.I.R. [1952] Mad. 184.
2. Gledhill, ibid., p. 707, citing Bhola Nath v Emp., A.I.R. [1941] All.1.
3. A.I.R. [1941] Bom. 410.
4. Gledhill, supra, p. 708.
5. See s. 378(3), Criminal Code, Cap 42.
6. Gledhill, supra.

defamation and the present exception is pleaded, the Indian courts hold that it must be presumed that it [was] made in good faith for the protection of an interest, in effect calling upon the prosecution to prove that it [was] not for the protection of an interest or that its publication was malicious.'[1]

As regards statements by judges, some additional protection is conferred by another provision of the Code which states that: 'Nothing is an offence which is done by a person when acting judicially as a court of justice or as a member of a court of justice in the exercise of any power which is or which in good faith he believes to be given to him by law'.[2] However, the protection 'given by this section is limited'[3] and does not extend, for example, to malicious imputations having no bearing on the proceedings.[4]

As for statements by counsel, the Indian courts have acknowledged the difficulties facing counsel but have nevertheless refused to accord absolute privilege to their statements in judicial proceedings.[5] However, counsel's good faith must be presumed - even where it appears that his client knows the particular imputation to be fake - because 'counsel's duty is to present his client's case and, in relation to defamation, it would be unreasonable to say that it is his duty to enquire whether his client's case is true or false'.[6] However, counsel

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1. Gledhill, op.cit., p. 709. It is submitted that the same approach should be followed in northern Nigeria.

2. s. 42, Penal Code, Cap 89.

3. Gledhill, supra.

4. Ibid.

5. See T.F.R. McDonnel v K.E., A.I.R. [1925] Ran. 345.

6. Gledhill, supra.

must 'use common sense and reasonable caution in putting defamatory questions'[1] and thus, for example, if counsel (in cross-examination) charges a witness with being a thief, a gambler, and frequenter of brothels when this is irrelevant to the proceedings in hand and the witness is generally highly regarded within the community,[2] he would not be entitled to the benefit of this exception.

As regards statements by parties and witnesses, 'the presumption of good faith in protection of an interest is more easily drawn in the case of [the former] ... than [of the latter]'.[3] 'It is [also] more easily drawn in regard to answers to questions put in cross-examination than to answers given in examination-in-chief'.[4] Gledhill submits, interestingly enough, that the presumption is also more easily drawn where examination-in-chief is by a public prosecutor 'whose duty it is to establish the truth' that where it is conducted by a private legal practitioner, 'whose duty is to his client'.[5] It seems, accordingly, that Gledhill regards counsel's supposed overriding duty to the court as something of a fiction.

Finally, as regards statements by witnesses, '[w]hen a statement is volunteered by a witness and is irrelevant to the proceedings, the burden would be on him to establish his right to the protection of the

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1. Gledhill, ibid., p. 710.
2. See M. Bannerjee v Emp., A.I.R. [1927] Cal. 823.
3. Gledhill, op.cit., p. 710.
4. Ibid.,
5. Ibid.

exception'.[1]

(iii) Fair and accurate reports

The Criminal Code confers protection on these in the following terms:

s. 379(2): Where the defamatory matter 'constitutes, in whole or in part, a fair report, for the information of the public, of any proceeding of any court, whether preliminary or final' it is entitled to conditional privilege. So too are reports (subject to the same conditions) of the 'public proceedings of any body ... authorised to hold such proceeding by [law]; or of 'any public meeting so far as the public is concerned in the matter published'. An overriding condition (which applies to all three instances mooted by the sub-section) is that 'the publication [must be] made without ill-will to the person defamed'.[2]

s. 379(1): Although only peripherally relevant to this head, this does provide that extracts from, or abstracts of, petitions to the President, Governor or Secretary of State; or documents published by or under their authority, are conditionally privileged - provided, again, that 'the publication is made without ill-will to the person defamed'.[3]

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1. Ibid., See, for example, Emp. v Ganga Prasad, (1907) I.L.R. 20 All. 685 where a witness (called, interestingly enough, by the defence) in a prosecution for theft asserted that he knew nothing about the theft in question but that the accused had stolen his watch some eight years ago and that 'he had [had] to pay money to Z, whom he pointed out in court, to recover it. Z was, in fact, a respectable person of some position and affluence.' The witness was held guilty of defamation.

2. For the full text of this provision, see Appendix III.

3. See Appendix III.

The Penal Code provides for this category of publication in terms of s. 391(2)(iv), which simply states that to publish a'substantially true report of the proceedings of a court of justice or of the result of any such proceedings' does not amount to defamation[1]. It needs no emphasis that this provision is very much more limited in ambit than the corresponding sections of the Criminal Code.

A surprising omission from both Codes is the absence of any provision covering fair and accurate reports of Parliamentary proceedings[2].

7.12. The Defence of 'Innocent Publication'

It may be recalled that, in the civil law of defamation, concern at the fundamental inequity of cases such as Hulton & Co v Jones[3] and Cassidy v Daily Mirror Newspapers Ltd[4] prompted the enactment (in the United Kingdom) of a special statutory defence of 'innocent publication'[5]. Similar provisions have been incorporated in the Defamation Laws of Lagos State, as well as those of the eastern and western states[6]: but these do not affect the position as regards criminal libel, since all are expressly declared to be confined to the civil law[7]. This

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1. Again, this is in terms of the opening words of s 391(2) (the full terms of which are, as previously noted, reflected in Appendix IV).

2. Contrast the protection afforded fair and accurate reports of such proceedings under the civil law, as described at p. 507 above.

3. [1910] A.C. 20 (H.L.(E.)).

4. [1929] 2 K.B. 331 (C.A.)

5. This is contained in s 4, Defamation Act, 1952.

6. See the discussion of this defence at p 516, et seq.

7. See s 15(2), Defamation Law, 1961 (Lagos State) and the identical ss. 19(2) in both eastern and western states Defamation Laws. These mirror the United Kingdom provision (contained in s 17(2), Defamation Act, 1952) that: 'Nothing in this Act affects the law relating to criminal libel'.

lacuna is most disturbing - especially in the light of the fact that criminal libel is - to a considerable extent - an offence of strict liability, as further discussed below[1]. The criminal law is not entirely without provision in this regard, however, and the relevant sections of the Criminal and Penal Codes must now briefly be examined.

In the Criminal Code, section 380(2) (which applies only to publication in a periodical, as defined below) provides that:

> 'The criminal responsibility of the proprietor, editor, or publisher, of any periodical for the publication of any defamatory matter contained therein, may be rebutted by proof that such publication took place without his knowledge and without negligence on his part'.[2]

'Periodical' is defined as 'includ[ing] any newspaper, review, magazine, or other writing or print, published periodically'[3]. The onus of proving the absence of knowledge or negligence lies clearly on the person seeking to escape his prima facie criminal responsibility; and, in keeping with general principle, it seems that proof on a balance of probabilities will suffice.

The extent of the protection conferred by this provision is not altogether clear. In circumstances such as those in R v Coker[4] (which involved the publication of a defamatory letter 'to the editor', written by the accused), it seems doubtful whether the editor or publisher of the newspaper - if charged - would have been able to escape liability under this section. The letter in question - alleging that the Alake

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1. See the discussion of the Importance of Mens Rea, at p. 659 et seq.
2. s 380(2), Criminal Code, Cap 42.
3. s.380(1), ibid.
4. (1927) 8 N.L.R. 7.

of Abeokuta was plotting to assassinate various persons - was prima facie defamatory[1]: so that it would have been difficult to establish the requisite absence of knowledge or negligence. Furthermore, the provision is clearly not expressly designed to cater for the Hulton v Jones or Cassidy v Daily Mirror situations; and its wording is very different from that pertaining in the Defamation Laws of the southern states in this regard. It is accordingly questionable whether its language could be stretched to provide a defence in such circumstances; but it is submitted that the answer must be in the affirmative. Although less explicit than the civil law provisions, it does nevertheless clearly state that the editor (for example) of a periodical may escape criminal responsibility if 'such publication [i.e., the publication of defamatory matter] took place without his knowledge and without negligence'[2]. Hence, it is strongly arguable than an editor who had no idea (to use the Hulton v Jones example) that a particular individual shared the same name as a fictitious character he had described in derogatory terms, should be able to show that the publication of defamatory matter took place without knowledge or negligence on his part. In the absence of reported decisions confirming this interpretation, the matter must, however, remain speculative to some degree.

As regards the Penal Code, the protection provided against 'innocent publication' is considerably more limited; and the only provision in point in this context provides a defence by inference rather than express wording. The section in question is s. 394, which states:

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1. Thus, it may be recalled - from the discussion of the case at p. 613 above - that the Full Court considered the allegation so clearly defamatory that it was 'hardly necessary' to say so.

2. See again s 380(2), as reproduced on the preceding page.

> 'Whoever prints or engraves any matter or prepares or causes to be prepared any record for the purpose of mechanical reproduction of any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both'.[1]

The implication from this is that the 'innocent' printer or engraver is not to be held liable at all. The section is silent as to the question of onus, but it would seem that the burden of proof must lie on the prosecution to establish the knowledge or reason for belief which is apparently a vital element in liability.

As regards the ambit of this provision, it is clear that its protection extends to printers, engravers and others engaged in the preparation of 'any record for the purpose of mechanical reproduction'; but it is less certain whether it extends to others involved in the publication process - such as the editor or proprietor of a newspaper. Prima facie, however, it seems that it does not extend to the latter category of persons. This limitation is most unfortunate.

Whether the provision would avail the printer (for example) in a Hulton v Jones situation is not entirely clear. Again, its terms are not specifically oriented to that kind of case: but it seems that its wording is sufficiently broad to provide a defence against liability in such circumstances (albeit one that may be relied upon by only a limited number of persons).

In summary, then, it is apparent that the Codes provide only a narrow protection against 'unintentional publication'; and it is submitted that this deficiency is in much need of redress.

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1. s. 394, Penal Code, Cap 89.

## 7.13. The Defence of Leave or Licence or 'Volenti non fit injuria'

Again, this defence cannot be relied upon in the criminal law since it is not included within the Codes. In any event, since the purpose of criminal proceedings is to punish the wrongdoer for the general benefit of society as a whole, the consent of the victim should, in principle, be considered irrelevant.

## 7.14. The Defence of 'Innocent Dissemination'

In the Criminal Code, the defence of 'innocent dissemination' is provided by s. 381. This states that the sale by any person of any book, pamphlet or issue of a periodical does not constitute publication of it 'unless [the seller] knows that [it] contains defamatory matter; or, in the case of any [issue] of any periodical, that such periodical habitually contains defamatory matter'.[1]

Protection against 'innocent dissemination' under the Penal Code is far less clearly provided; but may be inferred from s. 395. This states that the sale of any printed or engraved substance containing defamatory matter '<u>knowing</u>[2] that [it] contains such matter' is punishable by imprisonment for up to two years, or fine (of unspecified amount) or both. Again, the inference is that the sale of such matter without such knowledge is not an offence.

The Codes are silent as to the question of onus, but it would seem -

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1. s. 381 Criminal Code Cap 42. For full text, see Appendix III.
2. Emphasis supplied.

from the wording of these provisions - that knowledge that the publication in question contains defamatory matter must be proved by the prosecution.

The inference is particularly clear in s 381 of the Criminal Code which provides that the sale of a defamatory book, etc., 'is not a publication thereof for the purposes of this chapter [i.e. on Defamation] unless [the seller] knows that the book [etc.] contains defamatory matter'.[1] The wording of s 395 of the Penal Code is marginally more ambiguous, but it is nevertheless submitted by Gledhill that the onus does indeed lie upon the prosecution.[2] He further submits that whilst proof of knowledge must often be a matter of inference, it 'is not enough to show that the accused had reason to believe the substance to be defamatory'.[3] Knowledge cannot be presumed from the mere fact that a book (for example) which is offered for sale contains matter that is obviously defamatory, 'for a bookseller cannot read every book in his shop'.[4] However, '[i]f the defamatory nature of the book was a matter of common knowledge, [then] knowledge by the accused might be presumed'.[5]

## 7.15. The Defence of Apology and Payment into Court

There is no equivalent of this defence in either of the Codes nor does such a defence seem appropriate in criminal proceedings, where

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1. s. 381, Criminal Code Cap 42, emphasis supplied.
2. See Gledhill, op.cit., p. 716. Although Gledhill does not state so many words, this is the only possible inference from his observations.
3. Gledhill, ibid.
4. Ibid.
5. Ibid.

the object is the punishment of the wrongdoer in the interests of society.

## 7.16. Other Defences in Criminal Law

In the Criminal Code, provision is made for further defences in relation to factors which, in civil law, are considered relevant to mitigation of damages[1] only. The relevant sub-sections of the Criminal Code are as follows:

s. 379(9): This relates to publications made 'on the invitation or challenge of the person defamed';

s. 379(10): This covers publications made 'to answer or refute ... other defamatory matter published by the [complainant]'[2].

Publications satisfying these criteria are 'conditionally privileged': provided the three conditions contained in the proviso to s. 379 (discussed at p. 644 above[3]) are met.

The Penal Code contains no equivalent provisions.

## 7.17. The Importance of Mens Rea

It is not easy to determine the importance of mens rea in the context of criminal defamation[4]. It is, of course, a fundamental principle of

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1. See discussion at p. 542.

2. For the full text of these provisions, see Appendix III.

3. These, as previously explained, demand honest belief that the published matter is true; that the matter published must be relevant to the interest giving rise to the privilege; and that the 'manner and extent' of publication must go no further than is 'reasonably sufficient'.

4. The difficulty is exacerbated by the absence of any 'clear statement in any of the modern authorities as to the precise extent to which mens rea is required in criminal libel'. (Criminal Libel, Law Commission Working Paper No 84, London, 1982).

English common law that 'a man's act [can] not amount to a crime so as to make him liable to punishment unless he was himself conscious of doing wrong'.[1] This principle has become embodied in the maxim: actus non facit reum, nisi mens sit rea.[2] It is submitted by Aguda that 'the concept of mens rea ... is such a fundamental principle of law that a Nigerian court would uphold it in the absence of clear words in the relevant statute including it'.[3] However, it is also clear that this assumption could not apply in the face of plain provisions excluding mens rea as an element of a particular offence.

The extent to which mens rea is an element of criminal defamation depends, therefore, in large measure, on the terms of the relevant legislation. Both the Criminal and Penal Codes contain a number of provisions relevant to mens rea; and the topic is accordingly perhaps most easily understood by setting these out and then examining their effect.

As regards the Criminal Code, the sections relevant to mens rea - both in general and in the specific context of defamation - are as follows:

(i) s. 24: This establishes the general rule that 'a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident'.[4]

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1. Aguda, op.cit., p. 482.

2. This is defined by Gledhill, op.cit., p. 4, as meaning: 'no act entails criminal liability unless done in a criminal state of mind'. For further detail as to the evolution of the requirement of mens rea, see Gledhill, ibid., pp. 3-4.

3. Aguda, supra, p. 483.

4. s. 24, Criminal Code Cap 42.

Underlying motive is generally immaterial,[1] as is the result intended by the accused (except where 'the intention to cause a particular result is expressly declared to be an element of the offence'[2]);

(ii) s. 374(2): This defines the publication of defamatory matter (in a form other than spoken words or audible sounds)[3] as 'the exhibiting it in public, or causing [it] to be read or seen ... with intent that it may be read or seen by the person defamed or by any other person';[4]

(iii) s. 375: This provides that 'any person who publishes any defamatory matter is guilty of a misdemeanour, and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years';[5]

(iv) s. 376: This section is concerned with blackmail, and renders it a felony (punishable by seven years' imprisonment) to publish, threaten to publish or offer to obstain from publishing any defamatory matter 'with intent to extort money or other property ... or benefit of any kind'.[6]

(v) s. 380(2): This provides that '[t]he criminal responsibility of the proprietor, editor, or publisher, of any periodical [as defined in subsection (1)] for the publication of any defamatory matter

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1. Ibid.,
2. s. 24, Criminal Code, supra.
3. The publication of defamatory matter in such form is governed by s 374(1), which omits any reference to intention as contained in s 374(2).
4. s 374(2), emphasis supplied.
5. s 375, emphasis supplied.

contained therein, may be rebutted by proof that such publication took place without his knowledge and without negligence on his part'.[1]

(vi) s 381: This establishes the defence of 'innocent distribution' as discussed at p. 657 above and provides, in essence, that the distributor is not liable unless he knows that the publication in question contains defamatory matter.[2]

(vii) s. 377: This establishes the defence of justification, discussed above, which requires proof that the defamatory matter is not only true but was also published 'for the public benefit'.[3]

(viii) s 379: This provides for the defence of 'conditional privilege' in a number of circumstances, as previously discussed under the headings of"fair comment"[4] and "qualified privilege".[5] Certain subsections are expressly made subject to the requirement that the publisher must 'honestly believe the matter published to be true'[6] or that the publication must be made 'without ill-will to the person defamed in the honest belief, on reasonable grounds, that it is true'[7];

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1. s 380(2). In terms of 380(1), 'the term "periodical" includes any newspaper, review, magazine, or other writing or print, published periodically.' This provision has been further discussed at p. 656A.

2. See s 381, and the discussion above at p.657.

3. See the discussion at p.623 above.

4. See p. 632 above.

5. See p. 644 above.

6. These are subsections (7), (8), (9), (10) and (11), previously discussed at p 644 - 645 above.

7. This relates to subsection (12), previously discussed at p. 649 above.

and it has previously been submitted that, even where such requirement is not expressly provided, the defence of 'conditional privilege' is nevertheless lost on proof that the publication was actuated by express malice.[1]

In the light of these provisions, the attempt to determine the extent to which mens rea is an element of the offence of defamation is by no means easy. Whether matter is defamatory or not is an objective question, as previously discussed,[2] and it is accordingly irrelevant whether or not the accused intended the material to lower the reputation of the complainant, if this, in fact, has been the result. On the other hand, as reflected in (ii) above, the publication of certain kinds of defamatory matter does require mens rea in the limited form of intent that it should be read or seen by the person defamed or others. Further, it appears, from (iii) above, that knowledge by the accused of the falsity of the defamatory material may lead to increased punishment; and the significance of this is discussed further below.[3] However, it also seems that where the defamatory matter consists of 'spoken words or audible sounds',[4] the publisher may be convicted and sentenced to one year's imprisonment (under s 375) even though he may not have realised that the material was (objectively) defamatory (in terms of the definition in s 375) and even though he may have uttered the particular words (for example) without intent that they

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1. See p. 633 above.
2. See p. 614A above.
3. See p. 665 below.
4. See p. 661, n 3 above; and p 664, n 1 below.

be heard by the person defamed or any other.[1] To this extent, it seems therefore that mens rea is not required: unless, perhaps, the need for it can be inferred from the general terms of s. 24 (described at (i) above) or from the fundamental principle that mens rea is an essential element of criminal responsibility.[2] The correct interpretation is thus not readily apparent; and it is accordingly interesting to note that a number of English authorities regard defamation as based upon strict liability.[3]

In other respects, it is clear, however, that mens rea is a crucial factor in determining liability. Thus, as regards (iv) above, the crime of extorsion clearly requires mens rea on the part of the accused.[4] In addition, from (v) above, it appears that the innocent publisher and the innocent distributor of defamatory material are not to be held liable, thus indicating that mens rea is an element of criminal responsibility in these instances. Further, it appears that the accused's state of mind is also relevant (in a negative sense) in the context of (vii) and (viii) above, as it seems clear that the accused will not be able to rely on the defences of either justification or conditional privilege (in all its aspects) if he has acted in bad faith.

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1. See s 374(1), which defines the publication of defamatory matter in the case of spoken words or audible sounds as, simply, 'the speaking of such words or the making of such sounds in the hearing of the person defamed or any other person'.

2. See the statement by Aguda at p. 660, supra.

3. See, in particular, R v Wicks, [1936] 1 All E R 384, discussed at p. 616 above and further below.

4. See p. 661.

It remains to consider the meaning of s 375 of the Criminal Code - and the significance of its provision that 'any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years'.[1] On whom does the onus of proving such knowledge lie? And how is the burden of proof to be discharged? Both questions were canvassed by the Court of Criminal Appeal in R v Wicks[2] which accordingly provides an important - if disturbing - precedent in this regard.

As for the onus of proving knowledge, the Court of Criminal Appeal clearly affirmed (in relation to the substantially similar s 4 of the Libel Act of 1843)[3] that this lies upon the prosecution. Thus, the court declared:

> There is no doubt that, under such a count,[4] it is for the prosecution to satisfy the jury that the defendant had such knowledge, and that the burden of proving that he had not such knowledge never lies upon the defendant'. 5

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1. s 375 Criminal Code, Cap 42, emphasis supplied.

2. [1936] 1 All E.R. 384. The facts underlying the prosecution of Wicks for criminal defamation make fascinating (if disturbing) reading and are described in full by J.R. Spencer, 'Criminal Libel in Action - the Snuffing of Mr. Wicks', (1979) 38 C.L.J. pp.60-78, especially at pp. 60-63. It seems fair to conclude that something of a vendetta had developed between Mr Wicks and the Sun Life Assurance Company of Canada (which believed that 'Wicks was partly responsible for spreading ... rumours' concerning the company's financial stability) and that this underlay the prosecution of Wicks instituted by the company's solicitor.

3. S. 4 of the Libel Act, 1 43, (6 & 7 Vict. c. 96) provides: 'If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned ... for any term not exceeding two years...'.

4. The court was here referring to the count preferred against Wicks under s 4 above. He was also charged with 'publishing a defamatory libel ... contrary to section 5 of [the Libel Act 1843], where knowledge of the falsity is irrelevant'. See Spencer, supra, p. 65.

5. R v Wicks, supra, at 387.

This affirmation of a fundamental principle of criminal liability - that the burden of proving all elements of an alleged crime lies on the state - is to be welcomed. However, when it came to the question of determining whether the prosecution had discharged this onus, the judgment of the court proceeds on a basis which is disturbing favourable to the state and commensurately inimical to the accused.

The court further declared:

> 'In the present case, we see no reason for holding that the prosecution did not fully discharge the burden which rested upon them. The falsity of the libel is to be presumed, and, in the absence of a plea of justification, could not be questioned. The best and often the only way of proving that a statement was known to be false by the person who made it is to prove that he had the means of such knowledge. A jury is then entitled to draw what may be, in some circumstances, the irresistible inference that he had knowledge in fact'.[1]

This passage has been severely criticised by Spencer,[2] who points out that '[t]here is a difference between knowing something to be false, and believing it to be so';[3] and that, whilst 'a person [may] believe something to be false which happens to be true, ... he cannot know it to be false unless it is so'.[4] Accordingly, in Spencer's view,

> 'in order to prove that a defendant knew a libel to be false, the prosecution have in principle to show two things: (i) that he believed it to be false, and (ii) that it

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1. Ibid., at 387-388.

2. Op.cit.

3. Spencer, supra, p. 73.

4. Ibid.

was so'.[1]

However, the court in R v Wicks did not require the prosecution to lead evidence to prove beyond reasonable doubt the falsity of the allegation. On the contrary, the court was prepared to accept that the necessary proof was supplied by the presumption that a defamatory allegation is false. The effect of this is most disturbing. In Spencer's graphic phrase,

> 'Presuming the libel to be false in this context is handing the prosecutor on a plate one of the essential elements of the offence, relieving him of all necessity to prove it for himself. The presumption [thus] turns "knowing" it to be false into "believing it to be false", although the Libel Act clearly says the former,[2] and the latter is more severe to a defendant'.[3]

Furthermore, the presumption of falsity also rendered it unnecessary (in the view of the court) for the prosecution to lead evidence that the accused believed the defamatory allegation false (assuming of course, that such 'belief' - rather than 'knowledge' - is sufficient to ground liability). Thus, the court's reasoning proceeded as follows: The accused had published defamatory allegations regarding the complaint. These defamatory allegations (on the basis of the presumption above) were false. The accused had acknowledged that he had known the complainant for a number of years, and any person who had known the complainant for such time would have known whether the allegations were true or not. Ergo, the accused must have believed the allegations to be false: and no further evidence was required in this regard.

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1. Ibid.

2. It should be noted that the Nigerian Criminal Code, in s 375, also refers to 'knowing'.

3. Spencer, supra.

Thus, as Spencer points out, '[b]y invoking the presumption of falsity here as well, the court relieved the prosecutor of the need to furnish even secondary evidence of belief'.[1]

The overall effect of the court's approach may, accordingly, be summarised as follows:

> "Whilst stressing that the prosecution have the burden of proving knowledge of falsity in a charge under section 4, the court in fact forced the defendant to disprove it by turning the presumption that a libel is false into a presumption that the defendant knows it to be so'. 2

The possibility that s 375 of the Nigerian Criminal Code may be interpreted in the same way is disturbing. This approach clearly cuts across accepted principles of criminal liability and places far too heavy a burden upon the accused. It is accordingly to be hoped that Nigerian courts, in construing this section, will eschew the principles enunciated by the Court of Criminal Appeal in this case and will instead require the prosecution to prove all elements of the offence - including the fact that the accused (by virtue of the proved falsity of the defamatory allegation) must have known it to be untrue at the time of publication.[3]

Even if this approach is adopted, however, this will not be sufficient to eliminate all difficulties. In terms of s 375, the accused may still - in the absence of proof of his knowledge of falsity -

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1. Spencer, supra, p. 74.

2. Ibid.

3. It is accordingly disturbing to note the view of the West African Court of Appeal in R v Mba, [1937] 3 W.A.C.A. 190 that knowledge of falsity may be inferred from gross exaggeration. Thus, the court stated that 'an exaggeration may be so gross as to amount to a false statement'. This may be so: but it does not necessarily prove that the accused knew it to be false. He may well believe his exaggerated version of events - even though others would not so do. Knowledge of falsity must be more clearly shown.

be sentenced to a maximum of one year's imprisonment.[1] It follows that the offence of criminal defamation - to this extent at least - must be regarded as one of strict liability. It follows that in the Hulton v Jones[2] type of situation, the publisher of the defamatory matter (if prosecuted under the criminal law) could be sentenced to imprisonment for up to one year: and would not have any defence on which to rely, as the statutory defence of 'unintentional defamation' previously discussed[3] has no application in the criminal law.[4]

As regards the relevance of mens rea under the Penal Code, it should be noted - in the first instance - that the basic principle of English law that actus non facit reum nisi mens sit rea[5] 'applies to most penal sections of the Northern Nigerian ... Cod[e] ... [and] is not only important in the interpretation of the section[s] of the Cod[e] which define offences but also [underlies] the general and special exceptions in the Cod[e]'.[6] The section on Criminal Responsibility in the Code[7] contains a number of provisions reflecting the fundamental principle that a guilty mind is vital to liability. Thus, for example,

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1. Thus, on a charge of publishing defamatory matter knowing it to be false, the accused may be convicted simply of publishing defamatory matter, if it is not proved that he knew the matter to be false: s 179(1) Criminal Procedure Act, and Aguda, op.cit., p. 805.

2. [1910] A.C. 20 (H.L.(E.)).

3. See p. 517 above.

4. See s 15(2) Defamation Law, 1961 (applicable in Lagos State) which provides that the Defamation Law does not 'affect the law relating to criminal libel'. Identical provisions are found in the other Defamation Laws, applicable in the eastern and western states. See s 19(2) of the Defamation Law (eastern states) Cap 33 and s 19(2) of the Defamation Law (western states) Cap 32.

5. For the meaning of this maxim, see p. 660 above.

6. Gledhill, op.cit., p.4.

7. This is Chapter II, which comprises sections 43 to 58.

s 48 provides that 'Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of a lawful act in a lawful manner by lawful means and with proper care and caution';[1] and sections 50 and 51 exonerate from responsibility those too young 'to judge the nature and consequence[s] of [particular] act[s]'[2] and those of unsound mind.[3]

As regards provisions specifically relevant to defamation, the most important provision appears to be s 391(1) which defines defamation as the making or publishing (in various ways) of 'any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person'.[4] This would seem clearly to indicate that mens rea is indeed an essential element of defamation under the Penal Code. Gledhill submits, however, (in relation to this provision) that 'malice is only relevant when the accused pleads one of the exceptions of which good faith is an essential element'.[5] He then goes on to describe the type of evidence required to establish the intent referred to in s 391(1) and states: 'Except in such cases [i.e., where good faith is an essential element], it is sufficient that a reasonable man would regard the imputation as likely to affect the reputation of the person against whom it is made in any of the ways set out in explanation 4 [i.e. by lowering his intellectual or moral character, etc.]'.[6] This indicates that the accused's intent

1. s 48 Penal Code Cap 89.
2. See s 50, ibid.
3. See s 51, ibid.
4. s 391(1), ibid., emphasis supplied.
5. Gledhill, op.cit., p. 694.
6. Ibid.

to harm the reputation of the individual concerned must be judged objectively, using the standard of the reasonable man. If this objective test is satisfied, it is immaterial, (in Gledhill's view) whether the imputation does in fact cause harm to the complainant.[1] These dicta accordingly all go to indicate that no subjective inquiry into the accused's state of mind is necessary or appropriate except in cases where his defence rests upon his having acted in good faith. On this interpretation, therefore, criminal defamation in northern Nigeria is also essentially an offence of 'strict liability' - in the sense that the important criterion is the objective likelihood of harm to reputation rather than the subjective intent to bring such harm about.

Mens rea is also an important factor in relation to all save two[2] of the exceptions to liability under the Penal Code, as discussed above. Thus, in terms of s 391(2)(i), it is not defamatory to make an imputation which is true provided publication is for the public good; and, in terms of s 391(1)(2)(iv) it is 'not defamation to publish a substantially true report of the proceedings of a court of justice'. Hence, in neither of these provisions, is good faith expressly made a requirement:[3] but, in all other exceptions provided by the Code, it is essential that the accused should have acted 'in good faith' and this must inevitably necessitate an inquiry into his state of mind.

Mens rea is also relevant to the related offences of 'printing or engraving matter known to be defamatory'[4] (where liability depends

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1. See ibid.

2. These are the exceptions provided by s 391(2)(i) and (iv), as further explained in the text below. The other exceptions have, of course, been discussed at various points in the text above.

3. It is, however, of course arguable that the accused (in relying upon a defence of justification) would have to show his good faith in order to establish that he made the publication 'for the public good'.

4. s. 394 Penal Code Cap 89, heading.

on the accused 'knowing or having reason to believe that [the particular] matter is defamatory')[1]; 'and selling 'printed or engraved substance containing defamatory matter'[2] ('knowing that such substance ... contains such matter'[3]). The accused's knowledge of the defamatory matter is plainly an essential requirement under either provision: but it is interesting to note the difference in wording between the two sections. Thus, the former requirement is clearly satisfied by objective inquiry into whether the accused 'had reason to believe' the matter in question to be defamatory. The latter contains no equivalent provision, however, and provides no guidance as to how the accused's knowledge is to be shown. The inference from the difference in terminology, may therefore be that actual subjective knowledge must be established in relation to the latter offence.[4]

Mens rea is also an important element of certain additional offences related to some degree to defamation as further described below.

## 7.18. Offences Related to Defamation Provided by the Penal Code.

The first of these is the offence of 'Injurious Falsehood', defined in s. 393(1) as follows:

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1. s. 394, ibid.
2. s. 395, ibid., heading.
3. s. 395, ibid.
4. As indicated at p. 658 above, however, it is Gledhill's view that proof of knowledge may be a matter of inference; and that '[i]f the defamatory nature of [a] book was a matter of common knowledge, knowledge by the accused might be presumed'. Gledhill, op.cit., p. 716.

> 'Whoever, save as hereinafter excepted, by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any false statement of fact, intending to harm or knowing or having reason to believe that such false statement of fact will harm the reputation of any person or class of persons or of the Government or of any native authority in Northern Nigeria or of any local government authority in Northern Nigeria shall be punished with imprisonment for a term which may extend to two years or with fine or with both.'[1]

An exception to liability is provided by subsection (2), which states:

> 'It is not an offence under this section to make or publish in good faith a false statement of fact which the accused had reasonable grounds for believing to be substantially true and proof that he had such reasonable grounds shall lie on the accused'.[2]

The question whether a particular allegation constitutes a statement of fact or an expression of opinion 'is a matter for the decision of the court';[3] but it seems from Sudanese authority,[4] as cited by Gledhill,[5] that little attempt is made in practice to distinguish between the two. Thus, in Sudan Govt v Abdulla,[6] where the editor of a newspaper was charged under this section following his publication of an article alleging that 'the Sudan police force was so badly paid that its members were forced to take bribes', no distinction was drawn between the expression of opinion (that the police force

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1. s 393(1), Penal Code, Cap 89.
2. s 393(2), Penal Code, Cap 89.
3. s 391(1), ibid., explanation 2.
4. See text below.
5. Gledhill, op.cit., p. 712.
6. 1954 Sudan Court of Criminal Appeal Reports 5.

were badly paid) and the statement of fact (that they were obliged to take bribes).[1]

The section casts the burden on the accused of showing that the statement is substantially true;[2] and Gledhill accordingly submits that 'no partial statement of the facts, withholding a fact which would alter the impression made on the mind of the [recipient]'[3] would satisfy this criterion.

Mens rea is an important factor in the commission of the offence in a number of ways. Thus, it may be necessary to show that the false statement was 'intended to be read' in terms of a 393(1)[4] and, in all cases, it 'is not enough [to show] that the statement is false; it is also necessary that the accused should intend to harm the reputation of a person or class[5] or know or have reason to believe that the statement would harm reputation'[6] in this way. It seems, however, that the test of the latter intent or knowledge is objective, as confirmed by the court of criminal appeal in Sudan Govt v

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1. See Gledhill, supra.

2. s 393(2), supra.

3. Gledhill, supra, p. 713.

4. See preceding page for the text of s 393(1).

5. The meaning of 'class' was considered in Sudan Govt v Abdulla, supra, where the court of criminal appeal held that 'in construing the ... section, the courts should not be bound by the rules applicable to defamation; [and that] the police force was not too wide a body to be included in "any class of persons"'. See Gledhill, supra, p. 714, who points out, in addition, that 'in cases under the corresponding section of the Indian Code it has been held that to come within its scope, the class must be numerous, ascertainable with reasonable certainly, reasonably distinguishable from other classes and have some elements of permanence and stability, so that "capitalists", "money-lenders" and "landlords" would not form a class but religious denominations would and so would "the police" and "army officers".'

6. Gledhill, supra, pp. 713-714.

Abdullah,[1] above. This was also the view taken in another Sudanese decision, Sudan Govt v Mahgoub,[2] involving the publication of a newspaper article alleging an army conspiracy which (the court held) 'the accused must have known ... would harm the reputation of army officers'.[3]

Mens rea is also clearly an essential factor as regards the exception to liability provided by s 393(2) above, as only publication 'in good faith' is entitled to protection. In Gledhill's view, this requires 'due care and attention'[4] and, in circumstances where there is plainly some doubt as to the matter, the making of 'a genuine effort to reach the truth'.[5]

The Penal Code also prescribes certain other offences, related - to some degree - to defamation, in which mens rea is an important factor. Thus, in terms of s 396, it is an offence (in outline) to 'threaten another with injury to his person, reputation or property ... with intent to cause alarm to that person';[6] and, under s 399, it is

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1. 1954. Sudan Court of Criminal Appeal Reports, 5. In the court's view, the test was whether the reputation of the police or Government was likely to suffer'. See Gledhill, op.cit., p. 714, emphasis supplied.

2. [1957] S.L.J.R. 65. The article alleged that certain army officers had been arrested and hinted that one had been physically abused in order to extract a confession.

3. Gledhill, supra.

4. Ibid., p. 713.

5. Ibid. Thus, in Sudan Govt v Mahgoub, where 'the accused admitted that he doubted the truth of the statement when he published it', he should have made greater efforts in order to satisfy the requirement of publication 'in good faith'.

6. s 396 Penal Code, Cap 89.

prohibited (in essence) '[i]ntentionally [to] insult [a person] with intent to provoke a breach of the peace'.[1] Detailed consideration of these offences lies outside the scope of this study, however.[2]

## 7.19. The Penalties for Criminal Libel and Related Offences

The penalty for criminal libel prescribed by the Criminal Code varies according as to whether the publication of the defamatory matter was made with - or without - knowledge of its falsity. In the latter instance, where the accused 'publishes defamatory matter knowing it to be false' he is 'liable to imprisonment for two years',[3] Without proof[4] of knowledge of falsity, the publisher of defamatory matter is instead liable to imprisonment for one year. The burden of proving such knowledge lies on the prosecution, as previously discussed,[5] . The judgment of the west African Court of Appeal in R v Mba[6] suggests that knowledge of falsity may be inferred from gross exaggeration.[7]

The Penal Code draws no such distinction and simply provides that '[w]hoever defames another shall be punished with imprisonment for a term which may extend to two years or with fine or with both'.[8]

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1. s 399, ibid., heading.
2. For further information on these offences, see Gledhill, supra, pp. 716-719 and 720-722, respectively.
3. s 375, Criminal Code, Cap 42, See p. 661 above.
4. If it cannot be proved that the accused knew it to be false he may be convicted merely of publishing defamatory matter'. See Okonkwo and Naish, op.cit., p. 282).
5. See the discussion of R v Wicks [1936] 1 All E.R.384, at p. 666.
6. R v Mba [1937] 3 W.A.C.A. 190.
7. See the discussion of this point at p. 668, n 3.
8. s. 392, Penal Code, Cap 89.

Both Codes prescribe further penalties for related offences. Thus, in the Criminal Code, if defamatory matter is published 'with intent to extort money or other property' or 'with intent to induce any person to give [or] confer ... any property or benefit' to any person, this constitutes a felony and the offender is liable to imprisonment for seven years'.[1]

The penalties for offences related to defamation provided by the Penal Code are as follows:

(i) for the printing or engraving of matter known to be defamatory, imprisonment for a maximum period of two years, or fine (of unspecified amount) or both;[2]

(ii) for the sale of printed or engraved substance containing defamatory matter, imprisonment or fine as above;[3]

(iii) for the publication of an 'injurious falsehood', as described above,[4] imprisonment or fine as above;[5]

(iv) for criminal intimidation,[6] imprisonment or fine as above, unless the threat in question is 'to cause death or grievious hurt ... or the destruction of any property by fire ... or an offence punishable with death or imprisonment [of up to] ... seven years or to impute unchastity to a woman',[7] in which case

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1. S. 376, Criminal Code, Cap 42.
2. s. 394, Penal Code, Cap 89.
3. s. 395, ibid.
4. See p. 672 et seq.
5. s. 393(1), supra.
6. See p. 675.
7. s. 397(b), supra.

the penalty may be imprisonment for a maximum of seven years or fine (again of unspecified amount) or both;[1]

(v) for intentional insult with intent to provoke breach of peace,[2] imprisonment or fine as at (i) above.[3]

Under the Defamatory and Offensive Publications Act[4], a penalty of a fine of up to £50 (₦ 100) or imprisonment for up to three months or both may be imposed on conviction for the offence of provoking any section of the community through the publication of any matter likely to lead to such result. Commission of the offence may occur in the following ways:

(i) through the publication or display of 'the pictorial representation of any person living or dead in a manner likely to provoke any section of the community'; or

(ii) through the publication or circulation of newspapers, leaflets, posters and periodicals which are 'likely to provoke or bring into disaffection any section of the community'; or

(iii) through the singing or recording of songs 'the words of which are likely to provoke any section of the community'.[5]

Some protection is conferred on the "innocent disseminator" of such materials, provided he can prove that he made reasonable enquiries prior to the sale or other distribution and that these left him

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1. Ibid.
2. See p. 676,
3. s. 399, supra.
4. No. 44 of 1966.
5. s 2, ibid.

'unaware of the possibility that [the material] might be used for the purposes mentioned in subsection (1)' and that 'thereafter [he] withdrew the record from sale or recalled any record lent or hired out by him'.[1] The reference to the 'purposes mentioned in subsection (1)' is difficult to understand in that no express mention of any "purposes" is made in the subsection. The main effect of the provision (as discussed at p. 620 above) is to widen the ambit of "publication" by providing that:

> '1. Sounds where recorded shall, if defamatory, be deemed to be published if reproduced in any place to the hearing of persons other than the persons causing it to be reproduced...'.

Presumably, therefore, the "purposes" alluded to in the section on dissemination, described above, are those of reproducing - in the hearing of any other person - recorded sounds which are defamatory. The matter is far from clear, however, and there are, unfortunately, no reported cases which throw light upon the question.[2]

## 7.20. Proposed Reform of the Law of Criminal Libel in the United Kingdom

Recent prosecutions for criminal libel in the United Kingdom have re-awakened awareness that this offence (prior to 1977[3] considered

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1. s 3, ibid.

2. Nor is any guidance provided by the comment on the Act in the Nigerian Bar Journal of that year. See (1966) 7 'Annual Law Review' Nigerian Bar Journal p. 68.

3. This was the year in which a criminal prosecution for libel was instituted by Mr (later Sir) James Goldsmith against Private Eye in the case of Goldsmith v Pressdram Ltd. [1977] Q.B. 83. Since then, 'various others [have been prompted] to litigate libel in the criminal courts': Spencer, op.cit., p. 60. Thus, it can no longer be said - as stated by Duncan & Neill, op.cit., p. 151 - that it is only 'in theory' that the publication of a libel is a criminal offence as well as an actionable wrong.

something of a dead-letter) is still very much part of the law. In Spencer's succinct phrase, 'lawyers have now woken up to the fact that any writing which would ground a civil action for libel is automatically a criminal libel as well ... [and punishable by] up to two years' imprisonment and an unlimited fine'[1]. Considerable concern has been expressed at the harshness of the law in a number of respects and various proposals for reform have been put forward. Thus, to begin with the decision which so enhanced awareness of the present deficiencies of the law, it is interesting to note that the House of Lords itself in Gleaves v Deakin and others[2] has recommended that the law be reformed in two major respects.

First, their Lordships have recommended that the law should be amended 'to require the consent of the Attorney-General ... for the institution of any prosecution for criminal libel'[3]. Viscount Dilhorne pointed to the anomaly that leave is required for the institution of criminal proceedings against those responsible for the publication of newspapers[4] but that - in other instances - the decision to commence prosecution depends upon the 'unrestricted whim'[5] of the complainant. Accordingly, he believed that the 'fiat of the Attorney-General [should] be rendered necessary'[6] and both Lord Scarman[7] and Lord Diplock[8] concurred in this

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1. Spencer, supra.
2. [1979] 2 All E.R. 497 (H.L.(E.)).
3. Ibid., at 499, per Lord Diplock.
4. This, of course, is in terms of s 8, Law of Libel Amendment Act, as previously discussed at p. 604.
5. Gleaves v Deakin, supra, at 507, per Viscount Dilhorne.
6. Ibid.
7. Ibid, at 509.
8. Ibid, at 499.

recommendation. In adding his support to the suggestion, Lord Diplock further recommended that '[i]n deciding whether to grant his consent in the particular case, the Attorney-General [sh]ould ... consider whether the prosecution was necessary on any of the grounds specified in art 10.2[1] of the Convention'[2] and submitted that - if the Attorney-General were not so satisfied - 'he should refuse his consent.'[3]

The House of Lords also recommended a further improvement in the law to enable the accused to rely on "substantial justification" as a defence in appropriate circumstances. The reform of the civil law of defamation effected in the United Kingdom, by s 5 of the Defamation Act 1952[4] (also introduced in certain parts of Nigeria)[5] has, at present, no counterpart in the criminal law. 'The position at present is that if an alleged criminal libel contains several distinct allegations and the defendant fails to prove the truth of any one of them, the jury should in duty convict (R v Newman),[6] whereas if the allegation complained of is general in its nature it is sufficient to prove as much of the plea of truth as would justify the libel (R v Labouchere[7])'.[8] This situation is highly anomalous. Accordingly, the House recommended that the law be changed to enable the accused (as under section 5) to escape liability provided he can show that allegations which he cannot prove

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1. The terms of article 10 of the European Convention on Human Rights are reproduced at p. 48 above.

2. Gleaves v Deakin, supra, at 499.

3. Ibid.

4. See the discussion of this reform at p. 488 et seq.

5. i.e. in the southern areas, but not in the vast North. See discussion of the Sources of the Law of Civil Defamation.

6. (1853) 1 E. & B. 558.

7. (1884) 12 Q.B.D. 320.

8. Gleaves v Deakin and others, supra, at 507, per Lord Edmund-Davies.

true do not 'materially injure the [complainant's] reputation having regard to the truth of the remaining allegations'[1].

In addition, Lord Diplock drew attention to the discrepancy between the law of criminal libel and the obligations relating to freedom of expression which the United Kingdom has assumed under article 10 of the European Convention on Human Rights, as further discussed in due course[2].

Since the decision in Gleaves v Deakin and others[3], the need for reform of the common law has been canvassed in some depth by the Law Commission in the United Kingdom[4]. The Commission has concluded that there are 'features of the existing [common law] offence which are ... undesirable as a matter of principle'[5] and that the present common law crime should accordingly be replaced by a new statutory offence which would seek 'to penalise the worst sort of case, namely, the "character assassin" - the person who makes or publishes a deliberately defamatory statement about another, which is untrue and which he knows or believes to be untrue'[6]. In keeping with this objective, the Commission has further recommended that only a statement which is 'untrue,

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1. Ibid., citing s 5 of the Defamation Act, 1952.

2. See p. 690, et seq.

3. [1979] 2 All E.R. 497 (H.L.(E.)).

4. Criminal Libel, Law Commission Working Paper No 84, London, 1982.

5. Ibid, p 203.

6. Ibid. The Commission gave serious consideration to the possibility of abolishing any criminal sanction altogether and leaving it to the party aggrieved to seek a remedy in the civil courts: but ultimately concluded that conduct of the kind described above should remain subject to punishment under the criminal law. (It has further recommended, however, that the maximum penalty should be two years' imprisonment,or fine, or both. See ibid, p 205).

defamatory, and likely to cause the victim significant harm'[1] should be the subject of criminal prosecution; that mens rea should be made a crucial element in liability, so that the prosecution would have to show that the defendant 'intended to defame and must have known or believed the statement to be untrue'[2]; that a defence of absolute privilege should apply as in the civil law of defamation; and that no prosecution should be instituted save at the instance of the Director of Public Prosecutions, who 'should have sole responsibility for the conduct of proceedings'[3].

Further analysis of these proposals lies outside the scope of this study[4]; and attention must now instead be directed to the various deficiencies in Nigerian law - which appear clearly to stand in equal need of wide-ranging reform.

## 7.21. Shortcomings in the Nigerian Criminal Law of Defamation

The defects and lacunae in the Nigerian criminal law of defamation have been described at some length in the preceding sections and, at this point, it is accordingly proposed to do no more than focus on some of the principal shortcomings.

Thus, apart from the ease with which proceedings may be commenced and the absence of a statutory defence of "substantial justification"[5], the defects in the criminal law of defamation include the following:

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1. Ibid, p 204.

2. Ibid, p 205. The Commission has acknowledged the difficulty of proving such knowledge or belief on the part of the defendant and has called for further suggestions in response to its own recommendations in this regard (which are more fully described at paras. 8.20 - 8.44 of its Paper).

3. Ibid. This, of course, echoes the recommendation of the House of Lords as described above.

4. For further details, see ibid., pp 203 - 207.

5. These, of course, are the defects noted by the Lords in Gleaves, supra.

(i) the objective test applied in determining whether a particular publication has a defamatory meaning;[1]

(ii) the fact that publication to the person defamed alone may give rise to liability (at least under the Criminal Code) even though there can be no real risk to reputation in such circumstances;[2]

(iii) the rule that the accused may be convicted and sentenced for up to one year's imprisonment (under the Criminal Code) irrespective of whether he knew the defamatory matter to be false and thus notwithstanding his lack of mens rea;[3]

(iv) the rule (under the Penal Code) that the accused may likewise be convicted on the basis of an objective test - viz., whether he had 'reason to believe' that the imputation would harm the reputation of the complainant;[4]

(v) the presumption that the defamatory allegation is false and the indication (in R v Wicks) that the court is entitled to infer the accused's belief in such falsity from external circumstances;[5]

(vi) the requirement that the accused must plead justification when the charge is put to him so as to entitle him to lead evidence of the truth of the defamatory allegation at his trial;[6]

(vii) the limitation that truth alone is not sufficient to ground a defence but can do so only if the accused can also show that

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1. See the discussion at p. 612 et seq.
2. See p. 617.
3. See p. 663.
4. See p. 621.
5. See the discussion at p. 666 et seq.
6. See p. 623.

publication is for the public benefit;[1]

(viii) the absence of any defence of 'unintentional defamation', such as has been introduced (in certain parts of Nigeria at least) in the civil law[2].

Although these are not the only defects[3], they are perhaps the most disturbing. It is accordingly salutary to note, once again, the substantially different approach adopted in the United States of America to the criminal law of defamation, which goes an appreciable way (especially in the context of defamatory allegations concerning a public official) towards redressing certain of these shortcomings.

## 7.22. The Contrasting Approach of the United States to Criminal Defamation

In Garrison v Louisiana[4], the Supreme Court extended the 'express malice' requirement established in New York Times Co v Sullivan[5] to criminal defamation of public officials; and laid down further important principles which significantly narrow the scope of the criminal law of defamation in practice.

The proceedings arose out of allegations (made at a press conference, by the accused, a district attorney) that the 'large backlog of pending criminal cases [was due] to the inefficiency, laziness and excessive

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1. See p. 624.

2. See p. 656.

3. Thus, for example, it may be recalled that there is also no absolute privilege for parliamentary statements and reports, as pertains in the civil law (see p 642); and that defamation of the dead, or of a class may constitute a crime. (See p 609 and 611).

4. 379 U.S. 64 (1964)

5. 376 U.S. 254 (1964). This case has, of course, previously been discussed in the context of the civil law of defamation.

vacations of the judges'.[1] In addition, the accused charged the judges with 'hampering ... enforcement of the vice laws by refusing to authorise the expenses for the necessary investigations';[2] and also 'alluded to certain 'racketeer influences on our eight vacation-minded judges''.[3] He was convicted of criminal defamation, but this was reversed on appeal to the Supreme Court.

The Court referred to the 'express malice' requirement established in New York Times Co v Sullivan[4] in the context of civil defamation, and saw no reason why this requirement should not also apply in criminal proceedings. It thus stated:

> 'The reasons which led us so to hold ... apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy ... And since "... erroneous statement is inevitable in free debate ..." only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials''.[5]

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1. Garrison v Louisiana, supra, at 66. See also B.O. Nwabueze, The Presidential Constitution of Nigeria, London, 1982, p 476.

2. Ibid, (13 L ed 2d 125).

3. Supra, at 66.

4. 376 U.S. 254 (1964).

5. Garrison v Louisiana, supra, at 74 - 75.

However, since 'the known lie ... is ... at odds with the premises of democratic government', the 'knowingly false statement and the false statement made with reckless disregard of the truth'[1] are not similarly protected.

The Court also affirmed certain other vital principles. Thus, it declared that truth - in itself - is a complete defence; irrespective of whether publication was 'for the public benefit'.[2] '[T]he interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth concerning public officials and their official conduct'[3] - irrespective of whether the publication is motivated by ill-will or desire to injure. Thus, 'under Garrison..., criminal libel statutes of several states have been held unconstitutional because they diluted the defence of truth'[4] by requiring, in essence, that 'the publication of a true statement should also be for good motives and for justifiable ends'.[5]

Furthermore, the Court has also declared that - even if a false statement is shown to have been published with the requisite express malice[6] - 'criminal punishment is still not constitutionally justified unless the publication is calculated or has an imminent tendency to cause a breach of the peace, in the sense not merely of provoking the individual defamed to violent retaliation, but of provoking public disorder, which

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1. Ibid., at 76.
2. Contrast the provisions of the Criminal and Penal Codes regarding the defence of justification, discussed at p. 622, et seq.
3. Nwabueze, supra, p. 476.
4. Nelson and Teeter, op.cit., p. 307.
5. Nwabueze, supra, p. 476.
6. As explained above, with knowledge of its falsity, or being reckless as to whether it is false or not.

may happen only in the case of a popular political figure with [a] large following among the population'.[1]

The Court affirmed that the 'clear and present danger' test applies to criminal libel as well; and that suppression of publication is not justified unless this test is met.

The effect of this decision - in which the court has made it clear that 'libel can claim no talismanic immunity from constitutional limitations'[2] - has been to inflict 'a death-blow'[3] on criminal defamation. The practical significance of this is clearly revealed by the fact that '31, or about one fifth of the 148 criminal libel cases reported in the half-century after World War I, grew out of charges made against officials.'[4] There prosecutions were particularly disturbing because it seemed to many commentators that they were simply 'seditious libel actions in disguise: government's punishment of those who dare[d] to criticize its personnel.'[5] The change heralded by Garrison v Louisiana is accordingly particularly to be welcomed.

## 7.23. The Constitutionality of the Criminal Law of Defamation in Nigeria.

It remains to consider the constitutionality of the criminal law of defamation in Nigeria, in the light of the guarantee of freedom of expression

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1. Nwabueze, op.cit., p. 477.

2. This dictum is derived from New York Times Co v Sullivan, supra, at 269 but - it is submitted - seems equally appropriate in the context of criminal defamation as well.

3. Nwabueze, supra.

4. J.D. Stevens, et al., "Criminal Libel as Seditious Libel, 1916 - 65", (1966) 43 Journalism Quarterly, 110, cited by Nelson & Teeter, op cit, p 306.

5. Nelson & Teeter, op.cit., pp. 312 - 313.

contained in s 36 of the 1979 Constitution. This, in essence, guarantees the freedom 'to impart information and ideas without interference', subject - however - to derogations authorised by laws that are 'reasonable justifiable in a democratic society' to protect certain interests.[2] The permitted derogation relevant to defamation is, as previously discussed,[3] contained in section 41(1)(b) which upholds the validity of 'any law that is reasonably justifiable in a democratic society ... for the purpose of protecting the rights and freedoms of other persons' - including, clearly, the right to untarnished reputation.

Prima facie, therefore, the criminal law of defamation falls within the scope of the permitted derogations and it is legitimate for the law to impose criminal penalties on the makers and publishers of defamatory allegations in order to protect the right of others to reputation. However, whether the balance struck between the competing interests in issue (freedom of expression as opposed to protection for reputation) is correct - or, in the wording of the Constitution - is 'reasonably justifiable in a democratic society' is open to considerable question. The law, at present, is heavily weighted in favour of the state and against the accused - in a manner which in general would seem to cut across accepted principles of criminal liability. The criticisms of the criminal law of defamation listed above provide clear evidence of this imbalance

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1. The full text of this provision is reproduced at p. 201.

2. See the discussion of the guarantee of freedom of expression in 1979 Constitution at p. 199 et seq.

3. See p. 587.

in the prosecution's favour: and it is submitted that these aspects of the law take it beyond the bounds of what is 'reasonably justifiable in a democratic society'. In this regard, it is noteworthy that Lord Diplock, in the case of Gleaves v Deakin and others,[1] was clearly of the view that the law of criminal libel in England is inconsistent with the obligation to uphold freedom of expression assumed by the United Kingdom under the European Convention on Human Rights of 1950. This has significance for Nigeria as well, as the guarantee of freedom of expression in the Convention (contained in Article 10)[2] forms the foundation for Nigeria's own guarantee[3] and is substantially similar in wording. There is of course one major difference between the two provisions: in that Article 10 authorises derogations through laws which are 'reasonably necessary in a democratic society (to protect certain interests), while the Nigerian guarantee uses the formula 'reasonably justifiable in a democratic society'. The latter may appear wider and more flexible than the European formulation: but it is submitted that both should be interpreted in the same way and that all derogations from the guaranteed freedom should be subject to strict scrutiny so as to ascertain whether they do, in fact, correspond to a 'pressing social need'.[4] If this approach is not adopted, the danger is clear that the permitted exceptions may deprive the substantive right of most of its force and practical effect.

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1. [1979] 2 All E.R. 497 (H.L.(E)).

2. The terms of Article 10 are reproduced at p. 48 - 49.

3. See the section on the Nigerian Bill of Rights at p. 199.

4. This was the interpretation of the word 'necessary' adopted by the European Court of Justice in the Handyside case, and reaffirmed in the 'Sunday Times' case, further discussed at p. 784 below. The court thus ruled that derogation from freedom of expression could only be justified to the extent that the restriction in question could be shown (by the state) to correspond to a 'pressing social need'.

In summary, therefore, it is contended that the Nigerian guarantee of freedom of expression should be interpreted in the same way as the European Convention guarantee: and that Lord Diplock's comments on the inconsistency of the law of criminal libel with the United Kingdom's Convention obligations are equally applicable in the Nigerian context.

What, then, did Lord Diplock say? He began by pointing out that 'under art 10.2 of the European Convention, the exercise of the right of freedom of expression may be subjected to restrictions or penalties by a contracting state only to the extent that those restrictions or penalties are necessary for the protection of ... the reputation of individuals ... [and] the public interest'.[1] Against this background, Lord Diplock stressed certain unsatisfactory aspects of the criminal law of defamation: the rule that 'the truth of the defamatory statement is not in itself a defence';[2] the fact that '[n]o onus lies on the prosecution to show that the defamatory matter was of a kind that is necessary in a democratic society to suppress or penalise in order to protect the public interest';[3] the anomaly that 'even though no public interest can be shown to be injuriously affected by imparting to others accurate information about seriously discreditable conduct of an individual, the publisher of the information must be convicted unless he himself can prove to the satisfaction of a jury that the publication of it was for the public benefit'.[4]

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1. Gleaves v Deakin, supra, at 498.
2. Ibid.
3. Ibid., at 499.
4. Ibid.

Lord Diplock observed that these factors combined 'to turn art 10 of the Convention on its head';[1] and he concluded by emphasising the inconsistency between the law of criminal libel and the Convention guarantee in the following stark terms:

> 'Under our criminal law a person's freedom of expression, wherever it involves exposing seriously discreditable conduct of others, is to be repressed by public authority unless he can convice a jury ex post facto that the particular exercise of the freedom was for the public benefit, whereas art 10 requires that freedom of expression shall be untrammelled by public authority except where its interference to repress a particular exercise. of the freedom is necessary for the protection of the public interest'.[2]

The criminal law of defamation in Nigeria, as presently constituted, is equally inconsistent with the guarantee of freedom of expression contained in s 36 of the Constitution and goes far beyond what is 'reasonably justifiable in a democratic society' to protect the right of others to reputation. Accordingly, it is submitted that the law must be reformed to bring it into line with the constitutional guarantee and to eliminate the shortcomings previously identified. Thus - to name but a few of the more obvious examples - the truth of the defamatory matter (irrespective of the public interest in its publication) should be made a complete defence; the falsity of defamatory allegations should no longer be presumed and the test of what is defamatory should be made dependent on the accused's subjective intent; it should be made clear that criminal proceedings may only be instituted where this is required in the public interest and that in all other instances, the parties must rest

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1. Ibid.

2. Ibid.

content with civil remedies; and last - but by no means least - an equivalent of the Garrison v Louisiana rule should be introduced to prevent prosecutions for criminal defamation being used to stifle criticism of public officials and to ensure that proceedings (in such circumstances) are made subject to a threshold requirement of proof - by the official concerned - of "express malice" on the part of the publisher.

If these (and other necessary) changes are introduced, the criminal law of defamation will still be available in appropriate circumstances to provide protection to reputation - but the law will then strike a more appropriate balance between the competing interests involved and will no longer go further than is 'reasonably justifiable in a democratic society' to protect the rights and freedoms of others.

# C H A P T E R  E I G H T

## CONTEMPT OF COURT: GENERAL PRINCIPLES

### 8.1. The Significance of the Law of Contempt for Media Freedom

The law governing contempt of court is extremely wide-ranging and covers a myriad of different situations. Its principal significance for the media lies in the fact that publications of three kinds (those which infringe the 'sub judice' rule, 'scandalise' the court or misreport court proceedings) may be found to constitute contempt of court; whilst, in addition, a journalist's refusal - in the course of court proceedings - to disclose his sources of information is prima facie a contempt.

The wide impact of the law of contempt on media freedom is exacerbated by the fact that the law applicable in Nigeria is mainly the common law of England. Its rules, accordingly, are of ancient origin; and have evolved in piece-meal fashion over time. The result is that the law not only appears out-dated in many respects, but also abounds with anomalies. In addition, the common law tests for liability are onerous and the defences few; and the law thus weighs extremely heavily against an alleged contemnor. To make matters yet worse, liability is determined through a summary procedure which - in many instances - leaves little room for the application of fundamental principles of natural justice. The result - as regards the media - is not only to impose far-reaching restrictions on publication, but also to generate a strong impetus to self-censorship, in order to avoid potential liability.

In England itself - the source of the Nigerian law of contempt - the need for reform of the law has recently been brought into dramatic focus by a number of important cases, including the recent judgment of the European Court of Human Rights in the Sunday Times 'thalidomide' case: in which the Court found that the rule against 'sub judice' publication, as interpreted by the House of Lords, placed the United Kingdom in breach of her obligations under Article 10[1] of the European convention on Human Rights of 1950.[2] This ruling prompted the enactment of the Contempt of Court Act 1981, which goes some way towards meeting the various problems presented by the law, but leaves many others untouched. In Nigeria, however, no attempt whatever at reform has yet been made: and the media accordingly remain subject to rules which are highly satisfactory in a number of respects and which go disturbingly far in restricting freedom of expression.

## 8.2. The General Purpose and Ambit of the Law of Contempt.

The law of contempt has been recognised in English common law since the twelfth century[3]. Its purpose, in a nutshell, is to uphold the fair and effective administration of justice: and, since this can be undermined in a myriad of ways, the rules of contempt are commensurately diverse - so much so that 'contempt of court [has been described] as "the Proteus of the legal world, assuming an almost infinite diversity

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1. Article 10 contains a guarantee of freedom of expression in terms substantially similar to those found in the Nigerian Bill of Rights which (as previously described at p. 199 above) is largely modelled on the European Convention.

2. This case is examined further below, in the section on the 'sub judice' rule.

3. Fox, The History of Contempt of Court, 1927, p. 1. (cited by G.J. Borrie and N.V. Lowe, The Law of Contempt, London, 1973, p.3).

of forms"'.[1] Many of these appear to have no bearing on freedom of expression - though the recent case of Home Office v Harman[2], described in further detail in due course[3] graphically demonstrates the extent to which contempt rules prima facie irrelevant to the media (here the implied undertaking of a solicitor to the court not to use documents obtained on discovery except for the purpose of the particular proceedings in relation to which discovery has been ordered) may in fact impinge on freedom of the press (for the effect of the House of Lords' decision is to compel journalists in future to rely only on official transcripts of court proceedings which may be slow and costly to obtain[3]). Whilst thus recognising that there is no clear boundary demarcating the extent to which the law of contempt affects freedom of expression, it is nevertheless proposed to concentrate only on those aspects of the law with patent significance for the media.

Before identifying these however, it seems advisable to place them in context by providing a brief overview of the types of interference with the proper administration of justice which the law of contempt is designed to curtail.

First, it is clear that interrupting or insulting a judge in the course of proceedings interferes with the proper hearing of a case. Accordingly, conduct of this nature is counted as contempt (commonly termed contempt in facie curiae or direct[4] contempt) and is subject to criminal

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1. Moskowitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 Col. L.R. 780 (cited by C.J. Miller, Contempt of Court, London, 1976,p.1).

2. Home Office v Harman [1982] W.L.R. 338 (H.L.(E)).

3. A full discussion of this case is to be found at p.1192 below.

4. This terminology is more widely used in American rather than English law. See Miller, op.cit., p.2.

sanctions.[1] In addition, further direct interference in proceedings, through attempting to influence judicial officers, jurors, witnesses or parties; or by refusing to be sworn as a witness or to reply to questions relating to relevant evidence, may likewise militate against the proper and fair administration of justice, and therefore constitutes contempt.[2] Outside the ambit of the court itself, the publication (particularly by the mass media) of information relating to proceedings pending or in progress may prejudice the right of the accused (in criminal proceedings) or of the parties (in civil litigation) to have the matter determined in the light of legal principle and on the basis of evidence limited to that which is properly adducable in court proceedings.[3] Accordingly, publication of this nature is also counted as contempt (sometimes termed constructive or indirect[4]) and is likewise subject to punishment under the criminal law. In a more general context (not necessarily linked to any particular proceedings) comments imputing bias, interest or prejudice on the part of judges may undermine public confidence in their ability to act as impartial adjudicators and diminish public willingness to submit disputes to court for hearing. Accordingly, conduct of this nature is also prohibited as contempt under the general rubric of "scandalising" the court. Further, any refusal or failure to comply with an order of court must inevitably erode both respect for the courts and confidence in their ability to act as

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1. The penalties in question are described at p. 741.

2. The last-mentioned category is of particular significance to the media- for it means that a journalist who refuses to divulge the sources of his information when called as a witness in proceedings before a court, tribunal of inquiry or legislative investigatory committee, may be held guilty of contempt.

3. This is limited by the rules of evidence, which exclude - to name but one example - the admission of hearsay testimony.

4. See Miller, supra.

final arbiters in disputes; and conduct of this nature is therefore also counted as contempt - subject, interestingly enough - to punishment[1] under civil[2] rather than criminal law. Finally, any interference with the officers of the court - such as registrars, solicitors or process servers - in the proper discharge of their functions; or any breach by such officers of their duties to the court, may constitute contempt.

The different branches of the law of contempt are comprehensively described in Halsbury's Laws of England[3] and are also described (in varying degrees of detail) in a number of other English texts.[4] For the purposes of this study, however, attention is henceforth confined to those aspects of contempt with special significance for the media:

(i) the publication of information relating to matters sub judice;

(ii) publications scandalising the court;

(iii) reports of court proceedings (in public and private);

(iv) contempt through refusal - in the course of proceedings - to disclose sources of information.

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1. The appropriate penalties are described in further detail at p.741.

2. This is all the more anomalous in that the appropriate penalty, in many instances, is committal to prison and the aim of the proceedings is not only to secure redress to the party in whose favour the order in issue has been made but also to punish the recalcitrant contemnor and thus to deter others from following his example.

3. Vol. 9, 4th ed,, London, 1976.

4. See, for example, Borrie & Lowe, op.cit., Miller, op.cit, and Anthory Arlidge and David Eady, The Law of Contempt, London, 1982.

Before embarking, however, on a detailed analysis of the rules relating to each, it is first necessary to identify the sources of the Nigerian law of contempt and to draw attention to the close connection between Nigerian law and English common law in this regard.

## 8.3. The Sources of the Nigerian Law of Contempt

The law of contempt in Nigeria is derived, in the first instance, from the body of English common law received into the country by virtue of the general reception process previously described.[1] Rules relating to contempt are also to be found in the Criminal and Penal Codes - applicable in southern and northern Nigeria respectively[2] - but (contrary to the general principle that the Codes contain complete and exclusive statements of the law within the spheres they cover[3]) it is expressly provided[4] that Nigerian courts retain the common law power to punish summarily for contempt of court - notwithstanding the provisions in the Codes. The practical result is that the relevant sections of the Codes are rarely, if ever, invoked; and 'in all the reported cases of contempt of court in Nigeria ... there is no single instance where an individual or the press has been formally charged with the offence of contempt of court as defined in [these provisions]'[5].

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1. See p. 129 et seq.

2. See p. 142.

3. See p. 142 et seq.

4. The relevant sections are further described at p. 702.

5. A Adaramaja, 'Contempt of Court', in T.O. Elias, (ed.) Nigerian Press Law, London and Lagos, 1969, pp. 46 - 57, p. 48. This is not entirely true, as there are a limited number of cases on the contempt provisions of the Criminal Code, as further explained in due course, but the general observation nevertheless holds good that the common law is of far greater importance than the Nigerian legislation.

For the sake of completeness, the terms of the contempt provisions in the Criminal and Penal Codes should nevertheless be noted. As regards the Criminal Code, s 133 (in nine separate sub-sections) defines different aspects of contempt and provides that any person[1] guilty of such conduct is liable to imprisonment for three months. The sub-sections relevant to the media provide as follows:

> 'Any person who - ...
> (4) while a judicial proceeding is pending makes use of any speech or writing misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any party to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or ...
>
> (5) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or ...
>
> (9) commits any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceeding is being had or taken, is guilty of a simple offence and liable to imprisonment for three months'. 2

In the northern states, the Penal Code creates a general offence of contempt, cast in the following broad terms:

> 'Whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to £20 or with both'. 3

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1. This includes individuals, corporations or other entities recognised as such by the law. See Adaramaja, ibid., p. 47.

2. s 133, Criminal Code, Cap 42.

3. s. 155, Penal Code, Cap 89. The fine provided for is equivalent to ₦ 40.

In addition, s 182 renders it an offence punishable by imprisonment for up to two years or by fine (of unspecified amount) or both, to do any act either 'with intent to influence the course of justice in any civil or criminal proceedings, [or] ... whereby the fair hearing, trial or decision of any matter in that proceedings may be prejudiced.[1]

Furthermore, refusal to answer a question in the course of proceedings is an offence under s 142, which states that:

> 'Whoever, being legally bound to answer questions put to him on any subject by any public servant in the exercise of the lawful powers of such public servant, refuses to answer any such question, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to twenty pounds [2] or with both'. [3]

Finally, s 416 of the Penal Code (previously discussed in relation to sedition[4]) is also relevant to contempt in that it renders it an offence (punishable by imprisonment of up to seven years or fine of unspecified amount or both) to 'excite or attempt to excite feelings of disaffection ... against the administration of justice in Nigeria or any [state] thereof'.[5]

However, notwithstanding these provisions in the Codes, it is the common law of contempt which is applied in practice in Nigeria, as indicated

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1. Alan Gledhill, The Penal Codes of Northern Nigeria and the Sudan, London, 1963, p. 291, in discussing this provision, emphasises that - under its latter part - liability is strict; and that the courts will punish a person who publishes a report prejudicial to pending proceedings, 'even when the nature of the publication is unknown to him or when he does not know that proceedings are pending'.

2. This is the equivalent of forty naira.

3. Thus, as Gledhill, op.cit., pp. 325-326 points out, a contempt of this kind is punishable under this provision, rather than s 155, above.

4. See p. 400 and pp 427 et seq.

5. s 416, Penal Code (Northern Region) Federal Provisions Act, Act no. 25 of 1960.

above.[1] This is by virtue of the substantially similar s 6 in both Criminal and Penal Code Acts,[2] which states that:

> 'Nothing in this Act or in the code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as contempt of court; but so that a person cannot be so punished and also punished under the provision of the code for the same act or omission'. [3]

The difference between proceedings for contempt under s 133 of the Criminal Code and under the summary powers preserved[4] by s 6 was briefly examined by the West African Court of Appeal in Nunku v Inspector-General of Police.[5] It emphasised that there are 'two ways in which a person guilty of contempt of court can be dealt with'[6] and described these as follows:

> 'The first way ... is for the Court to punish the offender in a summary manner without issuing a summons or trying the offender in a formal manner, and the second is to hold a formal trial as in ordinary criminal cases....
>
> 'Section 133 of the Criminal Code [requires] [a] prosecution ... in due form of law; [and] the accused person after appearing in Court must be arraigned with consequent trial resulting in a verdict. Herein lies the difference between a prosecution for contempt of court and a summary way of dealing with the same offence by the court'. 7

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1. See p. 699.

2. Strictly, the northern Nigerian provision is contained in the Penal Code Law, to which the Penal Code forms the Schedule. Accordingly, further reference in s 6 as reproduced in the text below to 'Act' should be read as meaning 'Law' in the context of the Penal Code.

3. s 6, Criminal Code Act, Cap 42. The equivalent provision in the Penal Code Law, Cap 89 is virtually identical in wording.

4. There is some doubt as to the continuing validity of s 6 following the adoption of the 1979 Constitution, as further explained below.

5. (1955) 15 W.A.C.A. 23, reproduced by Chief Gani Fawehinmi, The Law of Contempt in Nigeria (Case Book) Surulere, Lagos State, 1980, pp 193-195. The facts of the case are described at p. 706, in brief outline.

6. See Fawehinmi, ibid., p. 193.

7. See ibid.

Following the adoption of the 1979 Constitution, doubts have been expressed, however, as to the continuing validity of s.6. This issue is examined below; but - before leaving the subject of the sources of the Nigerian law of contempt - it should be noted that contempt (as previously explained[1]) is punishable under both criminal and civil law. As far as civil proceedings for contempt are concerned, the relevant Nigerian law is derived entirely from English common law. Thus, contempt in the form (for example) of refusal to obey an order of court is governed entirely - and unquestionably - by the common law. Cases of contempt of this nature are legion in Nigeria, but lie outside the scope of this study since the law has only peripheral significance for freedom of the media. It is interesting to note, however, that the view has recently been expressed in Nigeria, echoing a dictum of Lord Salmon,[2] that 'the classification of contempt of court into criminal and civil has now become unimportant and unhelpful and almost meaningless'.[3]

## 8.4. The Continuing Application of the Common Law

In R v Onwuegbuna and another[4], in proceedings arising from the publication in a newspaper of a letter allegedly scandalous of the court, as further explained below,[5] it was contended on behalf of the defendants

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1. See p.698 above.

2. This was in Jennisson v Baker [1972] 1 All E.R. 997. at 1002.

3. Babalola v Federal Electoral Commission and anor, Suit No AK/M4/77, reproduced by Fawehinmi, op.cit., pp. 143 - 154, per, Aguda, C.J.
   See, however, the various points of difference between civil and criminal contempt described by Miller, op.cit., pp. 7-19; and note the doubts which he expresses (at pp. 16-19) as to the utility of abolishing the distinction.

4. [1958] 2 E.N.L.R. 17, reproduced by Fawehinmi, op.cit., pp. 243-248.

5. The facts and judgment in the case are further discussed at p. 922. below in the section on Scandalising the Court.

that '[t]he Court had no jurisdiction to punish contempts in a summary manner ... because ... section 133 of the Criminal Code provide[d] the sole method by which contempts of court [might] be punished in Nigeria'.[1] This argument was swiftly rejected on the basis of the clear wording of s 6: but it is a moot question whether this analysis holds good following the enactment of the 1979 Constitution.

The power of summary punishment sanctioned by s 6 is, of course, a power to punish in terms of the unwritten common law of contempt. As such, it cuts, prima facie, against the principle ultimately acknowledged as cardinal in Nigerian criminal law (and which was enshrined in s 22(10) of the Republican Constitution[2]) that 'No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law'.[3] Under the 1963 Constitution and its predecessor, however, this general principle was made subject to express exception as regards the unwritten law relating to contempt of court. Under the 1979 Constitution, by contrast, this saving for contempt is omitted from the equivalent provision of the Constitution - and this leads Okonkwo and Naish[4] to the conclusion that the unwritten law of contempt is now void for inconsistency with the Constitution in its new form. In marked contrast, however, Aguda[5] believes that it continues to operate; and his reasoning, with respect,

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1. See Fawehimni, supra, p. 244.

2. The Constitution of the Federation, Act no. 20 of 1963.

3. For further details surrounding the controversy as to the ambit of written and customary criminal law, and its ultimate resolution as above, see C.O. Okonkwo (ed.), Okonkwo and Naish on Criminal Law in Nigeria, 2nd ed., London, 1980, pp. 4-10.

4. Ibid.

5. T. Akinola Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, 3rd ed., London, 1982, para. 1341.

is persuasive. He points out that s. 33 (12) - the equivalent to s. 22(10) above - is expressly made 'subject' to other provisions of the Constitution. These provisions include s. 6(6)(a) which states: 'The judicial powers vested in [the courts] .. - shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law"'.[1] As Aguda points out these, 'inherent powers and sanctions' include 'the jurisdiction to deal summarily with contempts both in the face of the court and contempts out of the court'.[2] There is thus considerable force in his contention; and it is accordingly submitted that Aguda's view is correct - and that the summary power in relation to contempt continues to form part of Nigerian law. It is clear, however, that the common law jurisdiction is enjoyed only by courts of record: and this raises the question whether magistrates' courts are courts of record for this purpose.

## 8.5. Summary Contempt Powers of Magistrates' Courts.

There is some doubt as to whether magistrates' courts constitute courts of record so as to enjoy any summary powers of punishment for contempt at all. In Onitiri v Ojomo,[3] the plaintiff in proceedings before a magistrate's court had applied for transfer of the hearing to another

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1. See ibid., emphasis supplied.

2. Op.cit., para. 1342. Whilst the summary power to punish in the face of the court is clear (at least as regards superior courts, magistrates' courts being further considered below), the Nigerian courts have recently indicated that there are limits to the circumstances in which summary jurisdiction can be exercised in relation to contempt which is not in the face of the court. The latter type of contempt is, of course, of particular significance to the media; and this apparent limitation is further discussed in due course.

3. (1954) 21 N.L.R. 19.

court. The magistrate considered this a contempt and ordered that he be kept in custody pending trial before another magistrate[1] for the offence. The plaintiff's subsequent claim for damages for false imprisonment was dismissed. Of note, however, was the statement of Cormarmond, C.J. S.P.J. to the following effect:

> '"This is not a case where the magistrate assumed the jurisdiction of punishing a criminal contempt by the summary process of attachment or committal. Such jurisdiction can be exercised by the Supreme Court only'.[2]

Adaramaja accordingly concludes that 'it has not yet been directly decided in any court of authority in Nigeria whether a magistrate's court is a court of record for the purpose of being able to punish for contempt'.[3] It is difficult to reconcile this view, however, with the clear affirmation by the West African Court of Appeal (in proceedings emanating from Nigeria) that a magistrate's court is indeed a court of record and has power (within certain limits) to punish for contempt. The case in question here is Nunku v Inspector-General of Police,[4] where the appellant had been summarily committed to prison for five days - by a magistrate's court[5] - for contempt in the face of the

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1. This is interesting in that it shows that the magistrate was (apparently) conscious of the need to respect fundamental principles of justice, including the nemo judex in sua causa rule. However, if magistrates' courts are indeed courts of record, as submitted below, then it seems that he could have exercised summary jurisdiction (without any need to refer the matter to another court) as the conduct in question fell clearly within the category of contempt in the face of the court.

2. Onitiri v Ojomo, supra, as cited and with emphasis supplied by Adaramaja, op.cit., p. 53. Adaramaja also points out that 'Supreme Court' meant, in 1954, the old Supreme Court which is now the High Court.

3. Adaramaja, ibid.

4. (1955) 15 W.A.C.A. 23.

5. The court in question was a Grade III court, but it is not suggested that the grade of court is significant in this regard. The important division is that into superior and inferior courts, and all magistrates' courts clearly belong to the latter category, irrespective of their grade.

the court.[1] He appealed, inter alia, on the ground that the magistrate had no power to commit for contempt in this way. His appeal was dismissed by the Supreme Court of the Jos Judicial Division; and he appealed further to the West African Court of Appeal. Jibowu, Ag C.J. (delivering the judgment of the Court) declared:

> 'The Magistrate concerned has jurisdiction in criminal matters and could impose fines up to £25 or imprisonment up to three months. His Court is a Court of Record and has, like other Courts of Record, an inherent power to fine and imprison people guilty of contempt of Court up to the limit of its jurisdiction'.[2]

The court further emphasised, as previously explained,[3] that there are two ways in which contempt proceedings may be conducted. It also indicated that the summary procedure applies only[4] to contempt in the face of the court: but, since the case in issue involved contempt of such a nature, was satisfied that '[i]t was ... not necessary for the Magistrate ... to have gone through the usual procedure for a prosecution for contempt of Court'.[5]

In the light of this clear declaration of principle (which, it should be noted, was handed down subsequent to the Onitiri case[6]), it appears firmly established that magistrates' (and, by implication, other inferior) courts are indeed courts of record, with power to punish summarily

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1. For further discussion of the facts of the case, see p. 743 below.

2. Nunku v Inspector-General of Police (1955) W.A.C.A. 23; reproduced by Fawehinmi, op.cit., p. 193.

3. See p. 702 above.

4. It seems however that this is implicit rather than express in the statement of Jibowu, Ag C.J. that the first way applies 'when the contempt is in the face of the court'. The learned judge did not thus specify in so many words that the first procedure may be used only in such circumstances.

5. Supra, at 194.

6. Onitiri v Ojomo, (1954) 21 N.L.R. 19, described above. The Nunku decision was given in 1955.

for contempt - provided that the contempt is committed in facie curiae. The only argument (leaving aside objections founded on the constitutional guarantee of fair trial, discussed below) which can be raised against this conclusion is that the entire concept of 'courts of record' (with summary powers to punish for contempt) is rooted in the common law; and that the summary power is enjoyed by courts of record in England only because they, too, are creatures of the common law. In Nigeria, however, 'no court ... is a common law court ... and the powers [of all] [are] strictly limited to such as are given to them by the Constitution or the Statutes creating them....'[1]. In this regard, it is noteworthy that 'there is nothing in the Constitution or in any statute declaring the magistrates' courts and various [other inferior courts to be] courts of record.[2] Adaramaja accordingly submits that the West African Court of Appeal erred in its judgment: which, in his view, is not supported 'by any legal or statutory authority'.[3]

Cogent though this contention may be in principle, the balance of present authority is undoubtedly, however, to the opposite effect. In this regard, it is noteworthy that Aguda has no hesitation in confirming that inferior courts do have power to punish summarily for contempt: this jurisdiction being confined, however, to contempt committed in the face of the court.[4] Superior courts of record, which include the Supreme Court, Federal Court of Appeal, Federal and State High Courts and the Sharia and Customary Courts of Appeal,[5] enjoy - by

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1. Aguda, Principles of Criminal Liability in Nigerian Law, p. 14 (cited by Adaramaja, op.cit., p. 50).

2. Adaramaja, ibid., p. 51.

3. Ibid.

4. Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, supra, para. 1342.

5. See the section on the Nigerian courts at p. 146 et seq.

contrast - summary power to punish for contempt committed both in and ex facie curiae.[1] As regards the latter type of contempt, however, some limitations on the exercise of the summary jurisdiction have recently been emphasised by the Nigerian courts, as further explained in due course .[2]

## 8.6. The Reasons for Reliance on the Summary Jurisdiction

Two major advantages of the summary power of punishment for contempt no doubt account for the reliance placed in practice on this jurisdiction to the virtual exclusion of the provisions of the Codes. First, the punishment that can be imposed for contempt under s 133 of the Criminal Code, for example, is limited to three months' imprisonment and this may not seem sufficient penalty for a particularly deleterious contempt. By contrast, 'there is no limit to the punishment that can be inflicted'[3] under the summary procedure. Secondly, proceedings under the Codes can be instituted only through the usual formal channels and this must inevitably be more time-consuming and more expensive than the summary procedure under common law (according to which - in many instances - 'no charge is formally laid and no witnesses are called to prove the offence'[4]). Whilst the option of proceeding under the Codes remains theoretically open, the practical result (as confirmed

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1. i.e., in and out of the face of the court.
2. See p. 713, et seq.
3. Adaramaja, op.cit., p. 48.
4. Ibid.

by the record of past proceedings[1]) is that the common law power is far more important.

It needs no emphasis that - from the viewpoint of the defendant in contempt proceedings - the summary jurisdiction entails distinct disadvantages for both these reasons. There is also some doubt as to whether the summary procedure accords with principles of natural justice[2] or with the constitutional guarantee of fair trial.[3] It is accordingly somewhat disturbing to note that even the origin of the summary power (in relation, at least, to contempt ex facie curiae[4]) is surrounded by considerable controversy, and seems clearly to have sprung from a judicial error.

## 8.7. The Origin of the Summary Procedure for Contempt Ex Facie Curiae.

The origin of the summary procedure in instances of 'constructive' contempt may be traced to the case of Almon,[5] where the defendant was alleged to have published a pamphlet scandalising[6] the Lord Chief Justice by accusing him of having acted 'officiously, arbitrarily,

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1. See p. 699.

2. These are the principles summed up in the maxims memo judex in sua causa, and audi alteram partem, both of which may be infringed by the summary process in which the aggrieved judicial officer may himself convict and sentence the accused instanter.

3. This issue is further discussed below, at p. 732 et seq.

4. The summary power in relation to this type of contempt is, of course, of most concern to the media, as (apart from a journalist's refusal to disclose his sources when called as a witness), the media are mainly guilty of contempt through publication - which, of course, takes place beyond the confines of the court.

5. (1765) Wilm. 243; 97 E.R. 94.

6. The offence of scandalising the court is described in Chapter Ten.

and illegally'.[1] It was contended on his behalf that contempt of this nature could not be dealt with summarily and that he was entitled to trial by jury. Wilmot, J. prepared a judgment which was never in fact delivered,[2] but which was subsequently published by his son in 1802. In it, Wilmot, J. declared:

> '"The power, which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not,[3] to fine and imprison for contempt to the court, acted in the face of it.... And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the 'lex terrae', ... as the issuing (sic) any other legal process whatsoever.
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> I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and it therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society"'.[4]

This undelivered judgment and its underlying assumptions have been subjected to rigorous scrutiny[5] and it now appears clear that 'Wilmot, J.

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1. Almon's case, supra.

2. It was discovered that the rule nisi to attach Almon had been wrongly entitled 'The King v Wilkes' and the case had to be abandoned. See Miller, op.cit., p. 21.

3. If this statement is correct, it follows that the argument referred to above (that magistrates' courts are not courts of record, and so cannot enjoy summary powers of punishment in relation to contempt in facie curiae) is misconceived. It seems, however, that 'it is now generally accepted that it is only courts of record which have power at common law to proceed summarily' See Miller, op.cit., p. 25, emphasis supplied.

4. Almon's case, supra,at 254 and 99 respectively(cited by Borrie & Lowe, op.cit., p. 255).

5. See Sir John Fox, The History of Contempt of Court, 1927, supra.

was wrong in saying that constructive contempts had always been tried summarily'.[1] However, his judgment has given rise to a practice which has been repeatedly followed in all cases of constructive contempt (not only those involving the scandalising of the court[2]) and which is accordingly 'too firmly established to be overruled judicially'.[3] Moreover, the practice seems effectively to have ousted the alternative of proceeding by way of indictment: which was last invoked (in England) in 1902[4] and accordingly 'now seems to have fallen into desuetude'.[5]

Although the summary jurisdiction is now thus a firmly fixed feature of the common law, there remains something intrinsically offensive in the notion of contempt ex facie curiae being made subject to summary punishment at the instance of the very judicial officer thereby aggrieved. Perhaps for this reason - in addition to the issues raised by the constitutional guarantee of fair trial, as further discussed below[6] - the Supreme Court of Nigeria has recently indicated that there are limits to the circumstances in which summary jurisdiction may be exercised in relation to constructive contempts. These important restrictions accordingly merit some examination.

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1. Borrie & Lowe, op.cit., p. 256. For a more detailed analysis of the criticisms levelled at the judgment by Sir John Fox, see Miller, op.cit., pp. 21-22.

2. This, of course, was the form of contempt specifically in issue in the Almon case.

3. Borrie & Lowe, op.cit., p. 256.

4. This was in R v Tibbits and Windust, [1902] 1 K.B. 77.

5. Borrie & Lowe, ibid., who point out, however, at n 6, that this must be read subject to the comment of Pearson, L.J. in Re Attorney-General's application, Attorney-General v Butterworth, [1963], 1 Q.B. 696, 728.

6. See p. 719 et seq.

## 8.8. Limitations on the Exercise of Summary Jurisdiction Over Constructive Contempt.

In a decision of far-reaching significance, the Supreme Court of Nigeria has recently indicated that there are certain limitations on the exercise of summary jurisdiction in relation to constructive contempts. In the case of Boyo v Attorney-General of Mid West State,[1] determined by the Supreme Court in December 1969, the appellant had been summarily charged with contempt by Mr Justice Atake of the High Court of Mid-Western State on the grounds that he had 'tried by writing a letter to the Accountant-General of the Mid-West State to obstruct the payment out of money which the same judge had ordered to be so paid out'.[2] The appellant was arraigned before the court and a preliminary objection was taken on his behalf that the matter should not be heard by Atake, J., himself since a 'real likelihood of bias'[3] existed in the circumstances. This objection was dismissed by the trial judge who confirmed that 'his court was the proper forum to try the [appellant]'[4], according to the authority of R v Gray.[5] An adjournment to prepare a defence was accordingly requested and agreed;[6] and advantage was taken of this to appeal against the judge's ruling that his court was the appropriate forum for dealing with the matter.

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1. [1971] 1 All N.L.R. 342 reproduced by Fawehinmi, op.cit., pp. 159-167.
2. See Fawehinmi, ibid., p. 155.
3. Ibid., p. 156.
4. Ibid.
5. [1900] 2 Q.B. 36.
6. See Fawehinmi, supra, p. 162.

The first important point to note is the respondents' concession that the contempt had indeed been committed ex facie curiae. The proceedings therefore raised in crisp form the important question of whether such constructive contempt may be indeed by punished under the summary procedure - and by the very party aggrieved by the alleged wrong.

The Supreme Court began its examination of this issue by pointing out that in the case of contempt in facie curiae, 'the contempt cannot be dealt with efficiently except immediately and by the very judicial officer in whose presence the offence was committed'.[1] This conclusion by no means followed, however, in instances of contempt not in the face of the court. The Supreme Court was prepared to acknowledge that there might be 'cases [of constructive contempt] where the offence should be dealt with summarily',[2] but emphasised that 'the case should be one in which the facts surrounding the alleged contempt are so notorious as to be virtually incontestible'.[3]

The Court thus drew a clear distinction between contempt in and ex facie curiae, and strongly indicated that - in the context of the latter type of contempt - the summary jurisdiction should only be applied where the facts are 'virtually incontestible'. The Court made no attempt to define further the circumstances in which the facts may be said to be thus 'incontestible'; but did attempt to provide some criterion for distinguishing contempt in facie curiae (to which the summary jurisdiction undoubtedly applies) from constructive contempt. It

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1. See Fawehinmi, ibid., p. 166.

2. Ibid.

3. Ibid.

thus declared:

> 'Where the judge would have to rely on evidence of testimony of witnesses to events occuring outside his view and outside of his presence in court, it cannot be said that the contempt is in the face of the court'.[1]

The Court went on to stress the need for hearing - in all circumstances - to be conducted in accordance with cardinal principles of fair process; and this important aspect of the judgement is examined further in due course. For present purposes, the crucial point is that the Supreme Court seems to have placed a clear limitation - in relation to constructive contempt - on the circumstances in which the summary jurisdiction may be invoked at all. This conclusion is further supported by Oku v The State,[2] in which the court stated that, 'in most [such][3] cases, the proper procedure of apprehension or arrest, charge, prosecution, etc., must be followed'.[4]

## 8.9. Procedure for Instituting Summary Contempt Proceedings.

Accepting thus that there are limitations to the circumstances in which the summary procedure may be invoked at all, it remains to consider the manner in which summary proceedings for contempt may be instituted.

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1. Ibid., p. 166.
2. [1970] 1 All N.L.R. 60, reproduced by Fawehinmi, op.cit., pp. 202-207.
3. i.e. cases of contempt ex facie curiae.
4. Supra, p. 207.

At common law, it is clear that all courts (superior and inferior) have the capacity to act ex mero motu in relation to contempt committed in the face of the court. In addition, superior courts may act of their own motion 'in all cases of criminal contempt' [1] including - therefore - contempt ex facie curiae. In the past, in England itself, '[t]he predominant role [in instituting proceedings] has, however, been played by the Law Officers of the Crown';[2] and the important role of such officers has recently been accorded statutory recognition in the new Contempt of Court Act 1981 in the United Kingdom. Thus, s 7 of the Act provides:'Proceedings for a contempt of court under the strict liability rule[3] ... shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it'.

In Nigeria, however, no such statutory change has been made: and the common law rule remains in full force. Even legislative reform of the kind reflected in the United Kingdom enactment would not, however, solve all difficulties; as the principal problem lies in the capacity of the court to deal with contempt of its own motion - and this the Contempt of Court Act 1981 does not attempt to modify.

Apart from instances in which a court proceeds ex mero motu, it is also clear, at common law, that 'no one body has a monopoly'[5] as regards the

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1. Miller, op.cit., p. 40.

2. Ibid.

3. The 'strict liability' rule is further explained, in the context of sub judice branch of the law of contempt.

4. The case of Re Onagoruwa, Suit No FCA/E/117/79, further discussed at p. 764 below, graphically illustrates the unfortunate consequences which may arise from the capacity of a judge to proceed ex mero motu to punish a contempt ex facie curiae.

5. Miller, supra.

institution of proceedings. Thus, 'leave to apply for a committal order may, for example, be sought by the party to the proceedings allegedly prejudiced,[1] or by a witness allegedly subjected to pressure to change her testimony.[2] Alternatively, it seems that it may equally be brought by an ordinary member of the public with no especial interest in the matter[3]'.[4]

Detailed consideration of the procedure to be followed by such persons in initiating the summary process lies outside the scope of this study.[5] It should, however, be noted that (with the exception of two local rules applicable in this context),[6] the relevant procedure in Nigeria is governed by Order 52 of the English Supreme Court Practice 1982.[7] The reason, as explained by Aguda,[8] is that 'the practice in the High Court of Justice in England is to be followed in [Nigeria] in the absence

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1. See for example, R v Duffy, ex parte Nash, [1960] 2 Q.B. 188.

2. Re B. (J.A.) (An infant) [1965] Ch. 1112.

3. Metropolitan Police Commissioner, ex parte Blackburn (No 2) [1968] 2 Q.B. 150.

4. Miller, op.cit., p. 40.

5. For a clear and succinct summary of the relevant rules (applicable also in Nigeria, as explained below) see Miller, op.cit., pp. 29-35, especially at pp. 30-33; and for more detailed treatment of these provisions, see Borrie & Lowe, op.cit., pp. 258-267.

6. These are order 53, rr. 18 & 19 L, reproduced by Aguda, Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria, London, 1980, pp. 643 and 644 respectively.

7. Jacob, ed., The Supreme Court Practice 1982. London, 1981. Amendments pursuant to the introduction of the Contempt of Court Act 1981 and the Supreme Court Act 1981 are noted in the Fourth Cumulative Supplement but are of little importance to Nigeria as the procedural (as opposed to the substantive) rules have been little changed. The major changes introduced by the Contempt of Court Act 1981 are discussed below, in so far as these are relevant to the various forms of contempt of especial significance to the media.

8. Aguda, supra.

of provisions in [local] laws governing practice and procedure.... The practice to be followed ... except in the Eastern States is the practice "for the time being" applicable in England, that is the practice applicable at the point of time concerned. In the Eastern States, it is the practice applicable in England as at September 30, 1960 that is to be followed'[1] (but, in the context of committal for contempt, separate consideration of these is not necessary as the basic principles remain the same[2]).

The most important of the rules provided under Order 52 is R.S.C. Ord. 52, r 1(2) which (subject to certain exceptions[3]) confers 'a wide ranging and ... exclusive jurisdiction to make committal orders on Divisional Courts of the Queen's Bench Division'.[4] The procedure governing such applications is governed by Ord. 52, rule 2 and 3. In essence, the applicant must obtain the leave of the court, and in doing so, must state the grounds on which committal is sought and support this by an affidavit verifying the facts relied on. 'If leave to apply is granted, the application will be by motion, notice of which must generally be served personally on the person whom it is sought to commit'.[5] In Nigeria, 'the application under this Rule is usually filed in the Registry, and the Chief Judge either takes it himself or assigns another Judge to take it.... If leave is refused by the Judge, the only avenue open to the applicant is to seek leave to appeal within 14 days of the order of refusal. On changed circumstances, however, he may be

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1. Ibid., p. 644.

2. See Aguda, ibid.

3. Special rules govern contempt of a court presided over by a single judge of the High Court (viz, r. 1(3)); and contempt of the Court of Appeal, where the application may be made to that court, as confirmed in Metropolitan Police Commissioner, ex p. Blackburn (No 2) [1968] 2 Q.B. 150 (cited by Miller, op.cit., p. 33 n 15). The Nigerian equivalent

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permitted to make another application which may be heard by the same or another Judge'.[1]

## 8.10 The Principles Applicable to the Exercise of the Summary Power

The principles to be applied in exercising the summary jurisdiction have been canvassed on a number of occasions by the Nigerian courts. It has thus been emphasised, with particular force, that the jurisdiction is one sui generis, 'involving an exceptional interference with the liberty of the subject'[2] and that the power must accordingly be exercised as sparingly as possible. Accordingly, in Agbachom v The State,[3] the Supreme Court set aside the conviction for contempt of a litigant who had applied for a transfer of proceedings to another court (on the ground that the trial judge had a financial interest in the suit).[4] In allowing his appeal, the Supreme Court emphasised that the allegation was ambiguous and did not explicitly impugn the impartiality of the judge concerned. It further stressed that the judiciary should not display an 'undue

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of the Court of Appeal is, of course, the Federal Court of Appeal.

4. Miller, op.cit., p. 30. The Nigerian equivalents are, of course, the State High Courts, and the Federal High Court and Sharia and Customary Courts of Appeal.

5. Ibid., p. 32.

1. Aguda, op.cit., p. 645. There is accordingly some divergence in this regard between Nigerian practice and the English Supreme Court Rules. For further clarification, see Aguda, ibid. The English rules he quotes are derived from the Supreme Court Practice of 1979 but have not been changed in the 1982 edition.

2. Oswald on Contempt, p. 17, cited in Deduwa and others v The State [1975] 1 Part 1, All N.L.R. 1, further discussed below.

3. [1970] 1 All N.L.R. 69, reproduced by Fawehinmi, op.cit., pp. 65-72.

4. The allegation in question was that the trial judge had received the sum of £488-15 being the balance of 700 guineas 'legal debt' out of 'trust fund'.

degree of sensitiveness',[1] nor (by invoking their summary powers) 'give a wholly underserved advertisement to what had far better have been treated as unworthy of either answer or even notice';[2] that the contempt jurisdiction should be sparingly used, as 'its usefulness depends on the wisdom and restraint with which it is exercised'[3] and that '[i]t is not every act of discourtesy to the court ... that amounts to contempt'.[4]

Likewise, in Deduwa and others v The State,[5] (in which the Supreme Court again set aside a conviction for contempt, on the ground (further described below[6]) that the appellants should never have been put into the witness box and subjected to inquisition by the judge), the Court also stressed the need for judges to exercise their contempt powers sparingly and to conduct themselves 'without undue sensitiveness'.[7] It further commended that all courts in Nigeria should follow the principles enunciated in Oswald on Contempt,[8] (reproduced in full below[9]) which stress the need for the utmost care in exercising the contempt

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1. See Fawehinmi, supra, p. 70.
2. Ibid., p. 71.
3. Ibid.
4. Ibid.
5. [1975] 1 All N.L.R. 1, reproduced by Fawehinmi, op.cit., pp. 170-179.
6. See p. 725.
7. See Fawehinmi, ibid., p. 179.
8. See ibid., p. 178. The work cited is G.R. Robertson (ed.), Oswald on Contempt Committal and Attachment, 3rd. ed., London, 1910, and the relevant passage is to be found at pp. 17-18.
9. See p. 728.

jurisdiction.

Further, in Aniweta v The State,[1] although the Federal Court of Appeal upheld the conviction for contempt of a barrister who had alleged that a judge had accepted a bribe of ₦ 2000 in return for altering his judgment in particular proceedings, the appellate court did, however, reduce the sentence imposed on the contemnor from 200 days' imprisonment to 120 days, on the ground that the courts must exercise the contempt jurisdiction as sparingly as commensurate with the gravity of the offence;[2] and that the punishment imposed by the trial judge was 'severe in the extreme'.[3]

The Nigerian courts have also stressed the need for compliance with the principles of natural justice, as embodied in the maxims audi alteram partem and nemo judex in sua causa. As regards the former, it has been emphasised that no person should be punished for contempt 'unless the specific offence charged against him be distinctly stated and an opportunity of answering it be given to him.[4] As regards the nemo judex principle, some ambivalence has been displayed in past decisions, but the courts now seem to be moving towards acceptance that trial by the aggrieved judicial officer himself is incompatible with this fundamental principle. The authorities are somewhat inconsistent however, and it should be noted that the Federal Court of Appeal in Aniweta v The State[5] rejected the defence contention that the judge against whom the

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1. Appeal No FCA/E/47/78, reproduced by Fawehinmi, op.cit., pp. 98-116.

2. See Fawehinmi, ibid., p. 115, citing Re Davies (1888) 21 Q.B.D. 236 at 238, where Matthew, J. observed that 'The punishment should be commensurate with the offence. It may be severe where the contempt is grave....'.

3. Ibid.

4. Fawehinmi, ibid., p. 11, citing Aniweta v The State, supra, and Awosanya v Board of Customs, [1975] 1 All N.L.R. 106.

5. Supra.

'scurrilous ... abuse'[1] in issue had been directed was precluded from trying the alleged contemnor under the summary jurisdiction. Douglas, J.C.A. stressed that the court 'ha[d] taken some time to examine the authorities and ... [could] only say that this contention [i.e. that an aggrieved judge should not deal with the matter as he would then be a judge in his own cause] [was] not only baseless but [had] not the slightest legal backing'.[2]

Against this dictum must be weighed, however, the emphasis placed by the Western State Court of Appeal in Awobokun v Adeyemi,[3] that '[w]hen a contempt is not committed in the face of the court, a judge who has been personally attacked should not as far as possible hear the case'.[4] Furthermore, in Agbachom v The State,[5] the Supreme Court took pains to point out that where contempt proceedings are brought under s 133 of the Criminal Code,[6] they must then be tried 'before a different court'.[7]

Even more significant is the decision of the Supreme Court in Boyo v Attorney-General of Mid-West State,[8] in which the Court set aside

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1. See Fawehinmi, supra, p. 111. This description is clearly derived from the judgment of Lord Russell, C.J. in R v Gray [1900] 2 Q.B. 36.

2. See Fawehinmi, ibid., p. 111.

3. [1968] N.M.L.R. 289.

4. Fawehinmi, supra, p. 11.

5. [1970] 1 All N.L.R. 69, reproduced by Fawehinmi, ibid., pp. 65-72.

6. For a description of the provisions of the Criminal Code on contempt relevant to the media, see p. 700 above. The relationship between s 133 and the common law has been described at p. 702.

7. Agbachom v The State, as reproduced in Fawehinmi, supra, p. 72.

8. [1971] 1 All N.L.R. 342, reproduced by Fawehinmi, ibid., pp. 159-167.

a conviction for alleged civil contempt, which had been tried summarily by the very judge whose order was alleged to have been thwarted. In doing so, the court cited with approval the dictum of Laski, J. in a Canadian decision to the effect that 'it is preferable [even under the summary jurisdiction] ..., where conditions do not make it impracticable, or where there will be no adverse effect upon the pending proceedings by the delay, to have another judge conduct the contempt charge'.[1] The Court further emphasised that it 'fail[ed] to see how Atake, J. [the judge in question] would have avoided placing himself in the most invidious position of being an accuser, a witness, and also a Judge if he was permitted to hear the matter of contempt'.[2] Further, in the light of the particular circumstances, it was clear that - even if (in principle) '[the] matter [was] within the competence of Atake, J. to hear'[3] - this procedure could nevertheless not be permitted in the present case, as it was apparent from the record of the proceedings that 'the unhappy personal relationship'[4] between the judge and appellant would, inevitably, have militated against an impartial adjudication of the issue of contempt.

Furthermore, in the case of Deduwa and others v The State,[5] the Supreme Court also gave implicit support to the nemo judex in sua causa principle by emphasising that it could not 'too strongly deprecate the action of

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1. See Fawehinmi, ibid., p. 166. The judgment cited is that in Mckeon v Queen (1971) S.C.R. 357 at 477.

2. Ibid.

3. Ibid.

4. Ibid., p. 167; and see also p. 164, where the Supreme Court describes part of the record, from which the effect of this strained relationship is all too apparent, Atake, J. demonstrating his anger and impatience with the accused on several occasions.

5. [1975] 1 All N.L.R. 1, reproduced by Fawehinmi, op.cit., pp. 170-179.

a High Court judge degrading himself to the position of a prosecutor in his own court and at the end of it all purporting to find persons guilty of offences which were not described and nowhere formulated and dealt with as provided by law'.[1]

It is thus apparent that no clear statement of principle precluding an aggrieved judge from dealing summarily with contempt has yet been enunciated in Nigeria: but it is also manifestly evident that Nigerian courts (and the Supreme Court in particular) are deeply concerned at the prejudice to fair trial which failure to observe the nemo judex rule may cause; and that this has provided the foundation in one case at least[2] for setting aside a conviction for contempt.

The Nigerian courts have also stressed yet another important safeguard of "due process" in the exercise of the contempt jurisdiction. This is principle that an alleged contemnor must not be put into the witness box and compelled to answer questions regarding his offence, as this is inconsistent with the guarantee of fair trial enshrined in s 33 of the 1979 Constitution. Thus, in Agbachom v The State,[4] one of the main reasons given by the Supreme Court for allowing an appeal against conviction for contempt, was that the procedure adopted by the trial judge (in putting the appellant into the witness box rather than the dock[5])

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1. See Fawehinmi, ibid., p. 178. It is submitted that the Supreme Court was concerned both at this violation of the nemo judex principle and at the uncertainty of the unwritten law of contempt.

2. This of course, was in Boyo v Attorney-General of Mid-West State, [1971] 1 All N.L.R. 342, discussed at p. 722.

3. See s 33 Constitution of the Federal Republic of Nigeria, 1979. The general question of the constitutionality of the summary contempt jurisdiction is discussed further below.

4. [1970] 1 All N.L.R. 69.

5. See Fawehinmi, op.cit., p. 71.

'apart from anything else, ... offended against s 22(9) of the Constitution of the Federation'.[1]

Similarly, in Boyo v Attorney-General of Mid-West State,[2] the Supreme Court (again setting aside a conviction for contempt) emphasised that, although there might be 'cases [of constructive contempt] where the offence should be dealt with summarily',[3] in such instances 'the hearing [should] be conducted in accordance with cardinal principles of fair process'.[4]

Both of these passages were cited with approval by the Supreme Court in its subsequent decision in Deduwa and others v The State,[5] in which the court allowed an appeal against conviction for contempt on the ground (inter alia) that the appellants should never have been put into the witness box and subjected to inquisition by the trial judge. This would clearly seem to indicate the court's belief that the guarantees of fair trial provided by the Constitution must always be observed: even where trial is conducted by summary process. If this contention were taken to its logical conclusion, however, this would spell the virtual end of the summary process, for the alleged contemnor would then always be entitled 'to be given adequate time and facilities for the preparation of his defence'[6] and to be represented by counsel of his choice. The

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1. Ibid., p. 72. This provision of the 1963 Constitution has now been replaced by s 33 of the 1979 Constitution, which is in substantially similar terms.

2. [1971] 1 All N.L.R. 342, reproduced by Fawehinmi, ibid., pp. 159-167.

3. See Fawehinmi, ibid., p. 166; and see also p. 714 where this aspect of the judgment has previously been discussed.

4. Ibid.

5. [1975] 1 All N.L.R., reproduced by Fawehinmi, supra, pp. 170-179.

6. See s 33(6)(b) Constitution of the Federal Republic of Nigeria, 1979.

Supreme Court in Deduwa's case seems to have balked at going so far as this, and took pains to point out that where the summary procedure is applicable (on the basis elucidated in Boyo's case[1]) then 'the peremptory provisions of [the constitutional guarantee of fair trial] are disregarded'.[2] This aspect of the judgment is, however, open to considerable criticism. In the first instance, it seems logically inconsistent with the Court's approval of the dictum in Boyo's case that summary proceedings should be conducted in accordance with cardinal principles of fair process[3] and with its agreement that the procedure adopted in Agbachom's[4] case (in which the accused was put into the witness box and compelled to answer questions) offended against s 22(9) of the 1963 COnstitution.[5] Secondly, it seems to ignore the clear wording of s s 22(10) which made it clear that the contempt jurisdiction was exempted from the general requirements of fair trial guaranteed by the Constitution only to the extent that courts of record remained entitled to apply the unwritten common law, contrary to the general rule that '[N]o person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law'.[6]

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1. In Boyo's case, as previously discussed at p.714above, the Supreme Court indicated that the 'case [should] be one in which the facts surrounding the alleged contempt are so notorious as to be virtually incontestible'.

2. See Fawehinmi, supra, p. 177.

3. See p. 725 above.

4. Agbachom v The State, [1970] 1 All N.L.R. 69.

5. See p. 725 above. s 22 of the 1963 Constitution is the counterpart of s 33 of the 1979 Constitution.

6. Thus, s 22(10) which has no counterpart in the 1979 Constitution, began by affirming the general principle reflected in the text that a criminal offence must be defined in writing and its penalty likewise made clear, and then went on to state: 'Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a

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In any event, now that the guarantee of fair trial has been modified in the 1979 Constitution to exclude the proviso for contempt which formed the basis for the Court's view in this regard[1], it is strongly arguable that the safeguards of fair trial enshrined within the 1979 Constitution must be observed in all proceedings - including those brought under the inherent power to punish for contempt - and that failure to comply with their guarantees should be recognised as being unconstitutional (as further explained in due course).

For present purposes, however, suffice it to reiterate that the Nigerian courts have firmly ruled that an alleged contemnor is not to be placed in the witness box and compelled to give evidence against himself: and that failure to observe this principle means that any resultant conviction for contempt must be set aside[2].

In addition, the Nigerian courts have also emphasised that rules of court governing the commencement and conduct of proceedings must be strictly observed;[3] and have emphasised that judges must make it clear whether they are proceeding under the mutually exclusive provisions of

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written law and the penalty therefor is not so prescribed'. Thus, this proviso for contempt applied only to this particular subsection: and did not extend to the other parts of s 22 (which prescribed various further safeguards for fair trial). The Supreme Court, however, seems to have inferred that the proviso applied to all sub-sections of s 22: and this cannot be correct.

1. It will be recalled from the discussion of the continuing efficacy of s. 6 above, that the proviso contained in s 22(10) was not included in the equivalent s 33 of the 1979 Constitution.

2. Thus, in Deduwa's case, the Supreme Court was most reluctant to exonerate the appellants for their conduct, amounting - in its view - to the 'foulest form of contempt': (see Fawehinmi, op cit, p 179) but nevertheless considered it imperative to do so. (It also strongly rebuked the trial judge 'by whose mistake it ha[d] been possible for the appellants to escape the punishment ... commensurate with the gravity of their transgressions': see Fawehinmi, ibid.

3. See Aguda, op cit., p 644, citing Kalejaiye v Sulemon, unreported, FCA/L/157/77, March 22, 1979.

the common law or of the Criminal Code[1] - failure to do so being grounds to set any conviction for contempt aside.[2]

Finally, it should be noted that the Supreme Court has 'expressed its complete agreement'[3] with the following 'wise words'[4] regarding the exercise of the contempt jurisdiction; and has 'commend[ed] [them] to all courts' in Nigeria:

> "It should always be borne in mind in considering and dealing with contempts of court that it is an offence purely sui generis and that its punishment involves in most cases an exceptional interference with the liberty of the subject and that, by a method of process which would in no other case be permissible or even tolerated. It is highly necessary therefore, where the functions of the court have to be exercised in a summary manner, that the judge in dealing with the alleged offence should not proceed otherwise than with great caution and only in cases where the administration of justice would be hampered by the delay in proceeding in the ordinary courts of law; and that when any antecedent process has to be put in motion, every prescribed step and rule, however technical, should be carefully taken, observed and insisted upon. The jurisdiction should be exercised the more carefully in view of the fact that the defendant is usually reduced to such a state of humility in fear of more stern consequences if he shows any recalcitrancy that he is either unable or unwilling to defend himself as he might otherwise have done".[5]

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1. The relationship between the common law preserved by s 6 and the statutory rules of contempt provided by s 133 has previously been described at p. 702.

2. See Agbachom v The State, [1970] 1 All N.L.R. 29.

3. Deduwa and others v The State, [1975] 1 All N.L.R. 1, reproduced by Fawehinmi, op.cit., pp. 170-179, at p. 178 in Fawehinmi.

4. Fawehinmi, ibid. The passage cited is derived from Oswald on Contempt, op.cit., pp. 17-18. There are slight discrepancies between the passage as reproduced by the Supreme Court and the form in which it appears in Oswald, but these are insignificant.

5. Ibid.

## 8.11. Further Support for the Need for Compliance with Principles of Natural Justice

Given the importance attributed by the Nigerian courts to the audi alteram partem principle in the exercise of the summary jurisdiction (as described above), it is interesting to note that further support for the need for compliance with principles of natural justice has recently been provided by the Judicial Committee of the Privy Council in proceedings emanating from Trinidad and Tobago. The decision in question has considerable significance for Nigerian law for two reasons. First, it stresses the obligation - at common law - to comply with audi alteram partem; and, secondly, it emphasises the unconstitutionality (under a guarantee of fair trial similar to that contained in the Nigerian Bill of Rights[1]) of failure to inform an alleged contemnor in full of the charge against him. The latter aspect of the judgment is considered further below; and its importance for present purposes, lies in its ruling that the common law requires that the audi alteram partem principle be strictly observed.

The proceedings in question, Maharaj v Attorney-General for Trinidad and Tobago,[2] arose from the conviction and sentence (to seven days' imprisonment) of a barrister for contempt. The underlying facts are somewhat complex, but it appears that the barrister had been unable to appear before a particular judge (to represent his clients) in a number of proceedings, as other matters in which he had been engaged had continued for longer than anticipated. The judge had refused to

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1. The Bill of Rights of Trinidad and Tobago, - exceptionally - is not derived from the Nigerian Bill, (as are most of the Bills of Rights incorporated in the new states of the Commonwealth, as explained at p. 173); but its guarantee of 'due process' is essentially the same.
2. [1977] 1 All E.R. 411 (P.C.).

to grant adjournments requested on behalf of the barrister, and had proceeded with the matters, giving judgment against certain of the barrister's clients. He had also allowed certain medical evidence to be given in the absence of the barrister.

The barrister had accordingly spoken to the judge in question in his chambers and had asked him to recuse himself from further cases in which he (the barrister) was involved on the ground of the 'unjudicial' conduct the judge had displayed. The judge refused this request; and when hearing in one matter was resumed the following day, the barrister requested the opportunity to cross-examine the doctors who had previously testified in his absence. The judge refused: and the barrister 'then repeated to the judge in open court what he had said to him the previous day and stated that he reserved the right to impeach the entire proceedings'.[1] The judge challenged him as to whether he was suggesting that the court was dishonest, corrupt or biased against him; and the barrister replied: 'I say you are guilty of unjudicial conduct having regard to what I said yesterday'.[2] The judge then charged him with contempt; but made no attempt to specify on what grounds he did so. He rejected the barrister's request for an adjournment to consult with counsel, and proceeded to convict and sentence him to 'seven days' simple imprisonment'.[3] In his written reasons for his decision, he recorded that the barrister had made a 'vicious attack on the integrity of the Court';[4] but no such express charge was ever put to the alleged contemnor and no opportunity was given him to refute it.

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1. Ibid.
2. Ibid.
3. Ibid., at 415.
4. Ibid., at 411.

On appeal to the Judicial Committee, the Board stressed in its disapproval of the fact that:

> 'in charging the appellant with contempt, Maharaj, J. did not make plain to him the particulars or the specific nature of the contempt with which he was being charged'.[1]

The Board further declared, in a passage of far-reaching significance:

> 'This must usually be done before an alleged contemnor can properly be convicted and punished (Re Pollard).[2] In their Lordship's view, justice certainly demanded that the judge should have done so in this particular case. Their Lordships are satisfied that his failure to explain that the contempt with which he intended to charge the appellant was what the judge has described in his written reasons as 'a vicious attack on the integrity of the Court' vitiates the committal for contempt.'[3]

The Judicial Committee further acknowledged that 'the law does not require that anyone charged with contempt in the face of the court [should] necessarily be given the opportunity of consulting solicitors or counsel before he is dealt with';[4] but nevertheless considered it '"unfortunate"[5] that the opportunity to consult with senior counsel had not been accorded the appellant.

This opinion of the Judicial Committee is greatly to be welcomed. The summary jurisdiction operates extremely harshly against a person charged

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1. Ibid., at 416.

2. (1868) L.R. 2 P.C. 106. The vital dictum from this case is reproduced at p. 735 below.

3. Maharaj v Attorney-General for Trinidad and Tobago, supra, at 416.

4. Ibid.

5. Ibid.

with contempt (as this case graphically demonstrates); and the minimum safeguard which should be insisted upon is compliance with the audi alteram partem principle of natural justice. Privy Council rulings on the common law are, of course, not binding in Nigeria: but they do have highly persuasive authority; and it is accordingly submitted that the Nigerian courts should follow this opinion in future decisions; and should derive further support from it for the emphasis they have already begun to place on the need for an alleged contemnor to be informed in full of the basis of the charge against him and to be given an adequate opportunity to put his defence to the court.

## 8.12. The Constitutionality of the Summary Process

The concern thus evidenced to reconcile the summary jurisdiction with fundamental principles of natural justice has generated some doubt as to whether the summary process can be reconciled with the constitutional guarantee of fair trial, enshrined in s 33 of the 1979 Constitution. Notwithstanding their firm commitment to the unconstitutionality of an alleged contemnor being placed in the witness box and compelled to answer questions regarding his offence,[1] the Nigerian courts have not yet gone so far as to reject the constitutionality of the summary process in toto. Yet there is considerable force in such a contention, for the notion that the party aggrieved by an alleged contempt may serve as prosecutor, judge and jury[2] and may commit the

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1. See Agbachom v The State [1970] 1 All N.L.R. 69, discussed at p. 724 above; and see also Deduwa and others v The State, [1975] 1 All N.L.R. 1, discussed at p. 725 above. The unconstitutionality of this procedure lies, in essence, in its inconsistency with the constitutional guarantee that no person may be compelled to give evidence at his trial. See s 33(11), Constitution of the Federal Republic of Nigeria, 1979 (the equivalent of the subsection of the 1963 Constitution on which these cases were decided).

2. See the warning against this, voiced - inter alia - in Deduwa v The State, supra.

accused summarily to imprisonment (often without adequate hearing let alone time to prepare a defence) is clearly totally inconsistent with certain of the constitutitional guarantees of fair trial contained in s 33.

The provisions of s 33 most relevant in this context are those laid down in in subsections (6), (11) and (12). Subsection (6) guarantees a person charged with a criminal offence the rights 'to be informed promptly in a language that he understands and in detail of the nature of the offence; ... to be given adequate time and facilities for the preparation of his defence; ... [and] to defend himself in person or by legal practitioners of his defence'. Subsection (11) guarantees that no such person may be 'compelled to give evidence at [his] trial'; and subsection (12) states that:

> 'Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law'.

The argument that subsection (12) has rendered the summary power void for inconsistency with its provisions has previously been discussed[1] and will not be repeated here. The principle that a person charged with contempt cannot be placed in the witness box and compelled to give evidence against himself has already been accepted by the courts (as discussed above[2]), on the basis of the clear incompatibility of such procedure with the guarantee contained in subsection (11). Some consideration has been given to the question whether the exercise

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1. See p. 703.

2. See p. 724.

of the summary jurisdiction offends against subsection (6) - and the courts have stressed that an alleged contemnor must be informed in full of the charge against him.[1] However, no clear ruling on the constitutionality of the summary process has yet been given in Nigeria. It is accordingly salutary to note, in this regard, the recent opinion of the Judicial Committee of the Privy Council in Maharaj v Attorney-General of Trinidad and Tobago (No 2).[2] The facts of the case have already been explained[3] in the context of the appellant's appeal against conviction for contempt, which - it will be recalled - was allowed by the Board on the ground that the judge's failure to clarify the basis of the charge vitiated the committal for contempt.[4] Not content with seeking this relief alone, however, the appellant also instituted proceedings under s 6 of the Constitution of the country (the equivalent of the Nigerian s 42[5]), claiming 'redress for [the] contravention of his right, protected by s 1(a) of the Constitution, not to be deprived by his liberty save by due process of law'.[6] This provision in the law of Trinidad and Tobago is not defined with any particularity, but is clearly the equivalent of the right to 'fair trial', guaranteed by the Nigerian Bill of Rights. Accordingly, the ruling of the Privy Council on the question whether the accused's committal for contempt was indeed unconstitutional has considerable significance for Nigeria.

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1. See p. 721.
2. [1979] A.C. 385 (P.C.).
3. See p. 729 et seq.
4. See p. 731.
5. See the section on the Nigerian Bill of Rights, at p. 179, where the significance of s 42 is further explained.
6. Maharaj v Attorney-General of Trinidad and Tobago (No 2), supra, at 385.

In approaching this question, the Board pointed to its earlier ruling that the judge's order of committal was unlawful because it failed to comply with the long-settled common law rule that 'no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him is distinctly stated, and an opportunity of answering it given to him'.[1] Highly significantly, their Lordship's further view was that the order for committal accordingly 'clearly amounted to a contravention by the state of the appellant's rights under section 1(a) not to be deprived of his liberty except by due process'.[2] It should be noted that the Board was unanimous on this issue, even Lord Hailsham - who dissented from the majority view that the appellant was entitled to damages by way of redress, as further explained below[3] - being satisfied that 'a failure sufficiently to formulate the charge'[4] is inconsistent with the requirement of "due process".

The Judicial Committee ruling in these proceedings accordingly lends considerable weight to the contention that the summary jurisdiction may be inconsistent with the constitutional entitlement to fair trial; and will be so if the audi alteram partem principle is not satisfied. Unfortunately, however, it leaves aside the question (which, of course, strikes at the very heart of the summary jurisdiction) whether failure to comply with the other fundamental principle of natural justice - nemo judex in sua causa - is not equally unconstitutional. It is submitted that there is no reason in principle for distinguishing between the two; and that practical convenience does not supply

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1. Ibid., at 397, per Lord Diplock, citing in Re Pollard, (1868) L.R. 2 P.C. at 120.

2. Ibid.

3. See p. 738.

4. Maharaj v Attorney-General of Trinidad and Tobago (No 2), supra, at 406.

sufficient grounds for so doing. Accordingly, even where contempt is alleged to have been committed in the face of the court, both principles of natural justice should be followed: and the alleged contemnor should not only be informed in full of the charge against him and be given an opportunity of defending himself against it, but should also be accorded the vitally important right to have the matter heard by an impartial arbiter. Moreover, the alleged contemnor should also have an opportunity to prepare his defence and to instruct counsel of his choice to represent him.

The implementation of these recommendations would no doubt herald the end of the summary jurisdiction: but it is submitted that this is a result to be welcomed, rather than feared. It cannot convincingly be contended that contempt in the face of the court (much as it may offend the presiding judicial officer) is an offence of such great moment that it cannot adequately be dealt with except in a manner which contravenes every established principle of justice. And if this is reasoning is valid in the context of contempt in facie curiae, then - a fortiori - it must also hold good for constructive contempt, where it is particularly difficult to accept that the delay endemic in following normal trial procedures would detract in any real sense from the proper administration of justice.

One further point of importance - which lends considerable further force to the contention that the summary process is unconstitutional - should be noted. Section 33 of the 1979 Constitution guarantees the right to fair trial in terms which are absolute: in the sense that the rights guaranteed by s 33 are not made subject to derogation through laws 'reasonably justifiable in a democratic society' for the furtherance of specified interests. Thus, s 33 itself contains no "saving" for laws so justifiable (and thus stands in marked contrast

with the guarantee of freedom of expression contained in s 36); whilst the blanket provision contained in s 41 - which permits derogation from a number of rights, in the interests of public order, safety and so forth - makes no mention of the right to fair trial guaranteed by s 33. Moreover, it is also noteworthy that s 41 - which permits additional derogation from specified rights in times of emergency - again makes no mention, in this regard, of the rights guaranteed by s 33. The conclusion is thus irresistible that the framers of the Constitution regarded the guarantees of fair trial as particularly important: so much so that - unlike many of the other guaranteed rights - no derogation from them whatsoever (even in a period of emergency) is permitted. On what basis, then, can the summary jurisdiction - which cuts directly across s 33(6) and (11) - be justified? It is submitted that there is none.

In short, it is clear that the summary contempt jurisdiction is inconsistent with the guarantees of fair trial enshrined in s 33 of the 1979 Constitution; and that it cannot be "saved" under any authorised exception. It follows that the summary procedure is void to the extent of such inconsistency; and that it should therefore be replaced by procedures for the trial of contempt which make adequate provision for satisfaction of all the guaranteed safeguards of "due process".

The comments above apply to contempt of all kinds: whether or not committed by the media. Where the contempt in issue involves publication by the media, then further questions of constitutionality arise: for the 1979 Constitution guarantees not only fair trial, but also freedom of expression. The latter right is , of course, subject to derogation through laws 'reasonably justifiable in a democratic society' for the purpose of 'maintaining the authority and independence of

courts';[1] but it is a moot question whether many of the rules of contempt as they affect the media are so justifiable - and this issue will be further canvassed in due course.

Suffice it therefore for the moment to note one further aspect of the Privy Council ruling, which may serve to give practical impetus to the recommendation that the summary procedure be replaced by one more consonant with fair trial. The Judicial Committee, in the Maharaj[2] case, went on to hold by majority (Lord Hailsham dissenting)[3] that the appellant's right to redress for contravention of the due process requirement entitled him to monetary compensation for the loss he had suffered, including 'any loss of earning consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration'.[4] Since the appellant had made no claim for exemplary or punitive damages, the Board was not called upon to consider whether 'money compensation by way of redress under s 6 [the equivalent, as previously noted, of s 42 of the 1979 Constitution in Nigeria] can ever include an exemplary or punitive award.[5] It is plain, however, that the Judicial Committee's ruling does not exclude this possibility.[6]

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1. s 36(3)(a), Constitution of the Federal Republic of Nigeria, 1979.

2. Maharaj v Attorney-General of Trinidad and Tobago, No.2 [1979], A.C. 385 (P.C.).

3. Ibid. at 400-410, especially at 406, et seq.

4. Ibid., at 400.

5. Ibid.

6. It should be noted, however, that the difficulty in determining the principles which should govern the award of damages was one of the reasons given by Lord Hailsham for disagreeing with the majority on this issue. He acknowledged that guidance might be sought in principles long recognised in the law of tort, but also stressed that '[a]t present, the sea is an uncharted one': See ibid.

This ruling has considerable practical significance; and it is submitted that it, too, though not binding in Nigeria, should in future be followed by Nigerian courts. If this is done, it is likely to provide a powerful incentive to ensuring that - if the summary process is not abandoned altogether, as previously advocated - it will at least be exercised with more regard for the right of fair trial guaranteed by the Nigerian constitution.

Against the background of this decision, - as well as the Nigerian cases earlier noted[1] - it is somewhat disheartening to note the views of certain commentators on the law of contempt in the United Kingdom that the summary jurisdiction is a 'convenient' method of dealing with contempt, which requires little modification: save, possibly, for giving the accused the option of trial by jury if he so wishes. Thus, Miller affirms that '[t]he overall procedure appears to be convenient, subject always to the major contention as to whether a jury trial should be denied in cases of criminal contempt'.[2] Borrie & Lowe express an even more sanguine view, stating that:

> 'The present procedure has the virtue of interfering as little as possible with the normal business of the criminal courts ... [and] there is usually very little need to have recourse to a jury'[3]

although it might be desirable to introduce some discretion in this regard. On the other hand, it is salutary to note that the Phillimore Committee

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1. See p. 719 et seq.

2. Miller, op.cit., p. 32.

3. Borrie & Lowe, op.cit., p. 258. For further discussion by the authors of whether the summary procedure can be justified, see also pp. 256-258.

on Contempt[1] has expressed considerable concern over the dangers inherent in the summary jurisdiction; and has made a number of recommendations which are relevant in this regard. Thus, for example, it has suggested that 'any conduct, including publication, which is intended to ... obstruct the course of justice should continue to be capable of being dealt with as a criminal offence unless there are compelling reasons requiring it to be dealt with as a matter of urgency by means of summary contempt procedures'.[2] In addition, the Committee has recommended that "scandalising the court" should cease to form part of the law of contempt, and that it should be replaced by a different offence (discussed further in due course), chargeable on indictment only rather than by summary process.[3] As regards contempts committed in the face of the court, the Report suggests a number of provisions designed to secure greater fairness of trial - for example, that the contemnor should always be given 'an opportunity of explaining or denying his conduct, and of calling witnesses'[4] and that 'before any substantial penalty is imposed there should be a short adjournment'.[5] These recommendations have not, however, yet been implemented: the new Contempt of Court Act 1981 making no attempt to introduce appropriate provisions in this regard.[6]

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1. Report of the Committee on Contempt of Court ("the Phillimore Report"), Cmnd 5794, 1974.

2. Ibid., recommendation 16, cited by Paul O'Higgins: Cases and Materials on Civil Liberty, London, 1980, p. 162.

3. Ibid., recommendation 20. This is further discussed in Chapter Ten.

4. Ibid., recommendation 22(a). See also the Phillimore Report, supra, para 32

5. Ibid., recommendation 22(b). See also the Report, ibid, para 33.

6. Except, however, that the recommendations regarding the need to make legal aid available to a person liable to be committed or fined for contempt have been incorporated in section 13 of the new Act.

## 8.13. Punishment for Contempt of Court

At common law, '[i]n a case of criminal contempt, the superior[1] courts have the power both to fine, impose a theoretically unlimited[2] term of imprisonment, and to order the giving of security for good behaviour'.[3] It appears, however, from the decision in Attorney-General v James[4] that imprisonment should be for a fixed term, subject to it remaining 'open to the offender to apply thereafter for earlier release'.[5]

Civil contempt through failure to comply with an order of court may also be punished by committal for a fixed or indefinite term. The former is more appropriate where the object of the proceedings is to punish for a past offence; whilst the latter is more suitable where the aim is coercive and committal is designed to carry 'the maximum incentive to comply with the original order'.[6] In the latter instance, it seems eminently sensible (as has been emphasised in a number of cases in the United States of America[7]) that the contemnor should 'carr[y] the keys of his prison in his own pocket'.[8]

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1. The powers of punishment of inferior courts are, of course, confined to those conferred on them in general, as emphasised in Nunku v Inspector-General of Police, (1955) 15 W.A.C.A. 23, discussed at p. 707.

2. This is in the sense that the court need not specify any fixed period, but may simply commit the contemnor until such time as he has 'purged' his contempt. It follows, moreover, that no 'upper limit' is prescribed.

3. Miller, op.cit., p. 10.

4. [1962] 2 Q.B. 637 (D.C.).

5. Miller, ibid. Application for release is made under R.S.C. Ord. 52, r. 8(1), which applies (subject, of course, to suitable modification for local circumstances) in Nigeria as well. See p. 717.

6. Miller, ibid.

7. See Miller, ibid., p. 11.

8. Re Nevitt, 117 F. 448, (1902) at 461.

Earlier doubts as to the power to impose a fine for civil contempt have now been removed by the House of Lords in Heatons Transport (St. Helens), Ltd v Transport and General Workers Union,[1] in which fines totalling £55,000 were imposed on the recalcitrant defendant. In principle, as Miller points out, there is 'no reason why a suspended fine payable on continued disobedience after a specified period should not likewise be imposed as an aid to coercion'.[2]

As regards the penalties prescribed by the Criminal and Penal Codes, the former (as previously noted)[3] lays down a penalty of three months' imprisonment for contravention of s 133. The Penal Code prescribes imprisonment for up to six months or fine of twenty pounds[4] or both for contravention of s 155; whilst s 142 prescribes an identical punishment for failure to reply to a question in court proceedings. By contrast, s 182 (which prohibits any act prejudicial to the course of justice in pending proceedings) carries a penalty of imprisonment (for a maximum of two years) or fine (of unspecified amount) or both. An even sterner punishment is provided by s.416 (relating to the excitation of disaffection against the administration of justice) which renders such conduct punishable by imprisonment for up to seven years or fine of unspecified amount or both.[5]

## 8.14. Appeal Against Conviction and Sentence in the Context of Contempt

As regards appeal from conviction or sentence in the context of contempt, the summary jurisdiction may give rise to considerable difficulty,

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1. [1973] A.C. 15 (H.L.(E)).
2. Miller, supra, p. 12.
3. See p. 700.
4. This is the equivalent of forty naira.
5. See p. 701.

as graphically demonstrated by the case of Nunku v Inspector-General of Police.[1] Following his summary committal to imprisonment for five days by a magistrate for contempt in facie curiae, the contemnor appealed to the Supreme Court of the Jos Judicial Division, which dismissed the appeal on the ground, inter alia,[2] that he had no right of appeal.

On his further appeal to the West African Court of Appeal, the court stressed that '[a] right of appeal is a creation of statute and no such right exists where there is no provision for it in the statute or law creating rights of appeal'.[3] The relevant enactment was the Magistrates' Courts (Appeals) Ordinance (as regards appeal from the magistrate's court itself); and the West African Court of Appeal Ordinance (as regards further appeal from the Supreme Court to the West African Court).

Section 5 of the Magistrates' Courts (Appeals) Ordinance provided:

> '"Any person aggrieved by a conviction or order by a magistrate in a criminal case in respect of any charge to which he has pleaded not guilty or of which he did not admit the truth may appeal to the appeal court from such conviction"'.[4]

In the view of the West African Court of Appeal, the words underlined set the limits within which appeal lay as of right. Since the accused had been convicted under the summary procedure (sanctioned by s 6 of the Criminal Code Act), no charge had been put to him and he had not been

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1. (1955) 15 W.A.C.A. 23.

2. The other ground of appeal, as previously discussed at p.707 was that the magistrate's court had no jurisdiction to deal summarily with the contempt at all.

3. Nunku v Inspector-General of Police, supra, as reproduced by Fawehinmi, op.cit., p. 193. The second 'no' seems clearly an oversight.

4. Ibid., emphasis supplied.

called upon to plead. It followed that s 5 could not avail him.[1]

The Court pointed out that the same limitation was not contained in s 10 of the West African Court of Appeal Ordinance (which authorises appeal against 'conviction'[2] on any question of law), but clearly considered this irrelevant to the appellant's contention. Although the point is not expressly stated in the judgment, the inference is clear that the primary right of appeal (from the Magistrate's Court itself) must first be shown to be satisfied: and, failing this, no appeal to a higher court could be made.

It needs no emphasis that this interpretation - difficult to avoid on the wording of the statute - operates extremely harshly against a alleged contemnor who has been tried under the summary process. Not only is he deprived of the usual guarantees of fair trial but - to make matters yet worse - his normal right of appeal is then also denied.

The situation has now, however, been rectified to a considerable extent. Following the introduction of the Bill of Rights and its attendant entitlement to apply to the High Court for redress on the grounds of infringement of a fundamental right,[3] it is clear that an alleged contemnor may - as recently confirmed by the Judicial Committee of the

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1. Ibid., p. 195.

2. In this regard, the court cited the judgment of the Privy Council in R v Izuora, reproduced by Fawehimni, op.cit., pp. 188-191, p. 191), which had held that the word 'conviction' covers 'an order for payment of a fine and for imprisonment in default ... made by a Judge in the Supreme Court for conduct adjudged by him to amount to contempt of court'. A fortiori, an order for committal alone (as in the present case) would also constitute a 'conviction'.

3. See the section on the Nigerian Bill of Rights, where the procedure for securing enforcement of the guaranteed rights is further described, at p. 179 et seq.

Privy Council in Maharaj v Attorney-General of Trinidad and Tobago (No 2)[1] - institute proceedings claiming such relief, quite apart from any right of appeal against conviction and sentence which he may have. Such a claim, as the Board in the Maharaj case affirmed, 'does not involve any appeal either on fact or on substantive law [but simply raises] an inquiry into whether the procedure adopted by th[e] judge [in] committing ... for contempt contravened a [fundamental] right'.[2] Consequently, any restriction of the kind illustrated in the Nunku[3] case is irrelevant to the alleged contemnor's entitlement to this kind of redress.

A note of caution must, however, be sounded in this regard in the light of the further Privy Council ruling in Chokolingo v Attorney-General of Trinidad and Tobago.[4] Here, following the publication by a newspaper of a short story which - under the guise of fiction[5] - suggested that the judiciary in Trinidad and Tobago was corrupt, the editor and publisher of the paper were convicted of contempt, for 'scandalising the court'. At trial, both pleaded guilty on the advice of counsel; and neither made any attempt to appeal against either conviction or

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1. [1979] A.C. 385 (P.C.), previously discussed at p. 734 et seq.

2. Ibid., at 394.

3. Nunku v Inspector-General of Police, (1955) 15 W.A.C.A. 23, discussed above.

4. [1981] 1 All E.R. 244 (P.C.).

5. See ibid., at 245-246. The short story, entitled 'The Judge's Wife', was written in the vernacular current in Trinidad and purported to be an account by a servant recently dismissed from a judge's household of the way in which the judge and his wife and, it was suggested, his fellow judges habitually conducted themselves. A box heading to the story accurately summarised its contents: 'The old domestic was bent on exposing bribery, corruption and fraud in the household'.

sentence.[1] Some two and a half years later, however, the editor ('the appellant') applied to the High Court, under s 6 of the Constitution,[2] for 'declarations that the order ... for his committal was unconstitutional and void and that his subsequent imprisonment[3] under that order was in breach of the human rights and fundamental freedoms guaranteed to him by [inter alia][4] s 1(a)'.[5] The latter provision guarantees to every individual the right not to be deprived of his liberty except by due process of law. The main ground relied on in support of this contention was that the branch of contempt known as 'scandalising' the court had become obsolete and that the judge 'in committing him for that offence had [therefore] not imprisoned him according to due process of law'.[6]

The appellant's contention was dismissed by the High Court, following a 'careful survey from English and other Commonwealth jurisdictions'.[7]

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1. The editor was sentenced to 21 days' imprisonment; and the publisher to a fine of $500. In addition, both were ordered to pay the costs of the Law Society, which had initiated the application for their committal for contempt.

2. This, as previously explained at p. 734 above, is the equivalent of the Nigerian s 42, and entitles any party who alleges that his fundamental rights have been infringed to apply to the High Court for redress. For further information on the Nigerian provision - the counterpart of s. 6 - see p 180 et seq.

3. The appellant in fact served 12 days out of his 21 day sentence, the balance being remitted by the Crown. See Chokolingo v Attorney-General of Trinidad and Tobago, supra, at 246.

4. See ibid., at 246 and 247. The appellant relied originally also on the guarantees of freedom of thought and expression; and of the press. These latter grounds were abandoned in the proceedings before the Court of Appeal.

5. Ibid., at 246.

6. Ibid., at 244.

7. Ibid., at 247.

The appellant appealed further to the Court of Appeal (which likewise dismissed the application); and thence to the Judicial Committee of the Privy Council.

The Board took the opportunity to repeat its earlier dictum in the Maharaj[1] case that 'the fundamental right guaranteed by s 1(a) ... of the Constitution is not to a legal system which is infallible but to one which is fair.[2] It then proceeded to emphasise that s 6 should not be seen as providing an automatic collateral avenue of attack upon an unpopular judgment. As between the parties to litigation (whether civil or criminal) the final[3] judgment of a court is conclusive as to the law on the particular matter or question. Even if the court has been mistaken in its application of the law, the interests of certainty require that its ruling should stand unchallenged: except, of course, through the normal procedures for appeal. To allow a further challenge through an application under s 6 would result in 'parallel remedies [which] would also be cumulative since the right to apply for redress under s 6(1) is stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available''.[4] Their Lordships shied vehemently away from such a notion, emphasising that its 'result would ... be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to

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1. Maharaj v Attorney-General of Trinidad and Tobago (No 2), [1979] A.C. 385 (P.C.), previously discussed at p. 734 and p. 738, inter alia.

2. Chokolingo v Attorney-General of Trinidad and Tobago, supra, at 248.

3. See ibid., where the Board explains that a judgment is "final" 'either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal'.

4. Ibid., at 248.

enshrine'.[1]

In assessing the significance of this ruling of the Board, it must be remembered that the Privy Council was here concerned with an allegation that the judge had erred in law in committing the appellant for contempt (in that he had done so on the basis of rules which, so the appellant contended, were obsolete).[2] There is an important difference between an allegation of this nature and a contention that the court has failed to observe fundamental principles of natural justice in the exercise of the contempt jurisdiction (as was, of course, the submission in the Maharaj[3] case itself). An error of law is not the same as a failure to observe due process; and the Judicial Committee was accordingly correct to warn that alleged error in law does not suffice to found an application under s 6 for a declaration that due process has not been observed.

Where, then, does this leave the possibility of "appeal" through s 42 of the Nigerian Constitution (the equivalent of the Trinidad s 6)? It implies that any contention that a judge has erred in law in exercising the contempt jurisdiction (for example, in ruling that a particular publication is sufficiently prejudicial to pending proceedings as to infringe the sub judice rule[4]) must be pursued through the normal avenues of appeal and cannot form the foundation for an application for

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1. Ibid., at 249.

2. The Board doubted whether this was in fact so, but considered that the point was not worth ruling upon. Even if this were the case, it would simply reflect an error of law on the part of the judge; which would doubtless be unfortunate but could not be acknowledged as grounding as application for redress under s 6. See ibid., at 248.

3. Maharaj v Attorney-General of Trinidad & Tobago (No 2), supra.

4. The degree of prejudice required for liability under this branch of contempt is further described in due course.

redress under s 42. By contrast, however, a submission that a committal for contempt should be set aside because the judge failed to comply with the guarantee of fair trial contained in s 33 (for example, in putting the alleged contemnor into the witness box and forcing him to give evidence against himself[1]) may ground both an appeal through the usual procedures and application for redress under s 42[2]. The result may be to accord the contemnor parallel and cumulative remedies - but this (within the narrow framework thus outlined) not only seems legitimate in principle but has been also been given the sanction of the Privy Council: as evidenced by its rulings in both the first and second Maharaj decisions[3].

Section 42 thus provides an optional "extra" in certain circumstances. But, irrespective, however, of whether it is in fact available, the normal

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1. See, for example, Agbachom v The State, [1970] 1 All N.L.R. 69, discussed at p 724 above, and Deduwa and others v The State, [1975] 1 All N.L.R. 1, discussed at p 725.

2. This would seem the logical conclusion; but the matter is not as clear as in the Trinidad Constitution, where section 6 expressly states that an application may be made under it 'without prejudice' to any other relief in respect of the same matter. S 42 contains no such express assertion; but neither does it indicate that there are any limits to the right of a person 'who alleges that any of the provisions of ... Chapter [IV] has been [or] is being ... contravened in relation to him' to apply to the High Court for redress. Thus, there is no indication that the fact that he has also appealed through the usual procedures disentitles him from seeking redress under s 42: and, indeed, much of the value of the provision would be lost if this interpretation were to be adopted. It is submitted therefore that any such suggestion should be eschewed; and that it is appropriate to acknowledge that there are concurrent rights of "appeal" against committal for contempt where the summary jurisdiction has been exercised without due observance of guarantees of fair trial.

3. It will be recalled, as earlier explained at p 734 above, that there were two sets of proceedings in the Maharaj case. In the first, the appellant simply appealed against his conviction and committal under the normal rules of appeal: and was, in fact, successful in having his conviction set aside on the ground that the judge had failed to observe the obligation imposed by common law of informing the alleged contemnor in full of the charge against him. In the second set of proceedings (instituted, in fact, shortly before the appeal), the appellant sought a declaration under s 6 that his committal infringed the constitutional guarantee of due process. This issue came before the Judicial Committee after their ruling

(continued)

channels of appeal remain of considerable significance - and must now briefly be examined. The relevant rules have been summarised by Fawehinmi[1], as follows.

An appeal against a committal order by a court of first instance for contempt lies as of right and does not need the leave of that court.[2] Moreover, appeal against conviction for contempt by a State High Court or by the Federal High Court to the Federal Court of Appeal lies as of right,[3] and further appeal from the Federal Court of Appeal to the Supreme Court may be brought as of right if the appeal involves a question of law alone (rather than a question of fact or mixed question of law and fact).[4] In the latter instance, however, leave of the Federal Court of Appeal may be sought and, if this is refused, application for leave may be made to the Supreme Court itself.[5] Where the conviction is imposed by the Federal Court of Appeal itself, the position is substantially the same, appeal lying as of right only if the question at issue is one of law alone; and, in other cases, the leave of the Federal Court (or, failing this, the Supreme Court) being required.[6]

The Supreme Court itself also has inherent jurisdiction to punish

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(continued)
on the first question; and the Board gave no indication that the earlier proceedings precluded the appellant from pursuing this form of redress as well. In fact, the Board even went so far as to award the appellant damages for wrongful imprisonment to afford him 'redress' under s. 6.

1. Fawehinmi, op.cit., pp. 26-27.

2. Fawehinmi, op.cit., p. 26, citing Ikabala v Ojosipe [1972] 4 C.C.H.C.J. 135; In re Aniweta FCA/E/47/78, 31 May 1978; and Re Onagoruwa, FCA/E/117/79.

3. Fawehinmi, ibid., citing section 220, (1)(a) Constitution of the Federal Republic of Nigeria, 1979.

4. Fawehinmi, ibid, citing section 213, ibid.

5. Fawehinmi, ibid., citing section 213, ibid.

6. Fawehnimi, ibid., p. 27, citing section 213, ibid.

summarily for contempt; and no appeal against conviction can be brought as the court is the final court of appeal in Nigeria. Application may, however, be made for a presidential pardon.[1]

One further anomalous aspect of the right of appeal for contempt - which has had considerable practical significance since it has gravely inhibited the development of the common law to keep pace with modern times - remains to be clarified. This is the absence - for many years - of any right of appeal, in England itself, for criminal contempt of court.

In English law, for some fifty years, appeal was possible only 'in respect of a decision concerning a civil contempt'.[2] This was the result of 'a quirk in parliamentary drafting'[3] for the Criminal Appeal Act 1907 which (for the first time) provided a general right of appeal in criminal cases, stipulated that 'only a person "convicted on indictment" could appeal'.[4] It followed that a person convicted of contempt under the summary jurisdiction fell outside the ambit of the statute. Nor could such a person rely on a right of appeal to the Court of Appeal, 'since it was expressly provided that no appeal lay to that court "in any criminal cause or matter"'.[5] The person convicted of criminal contempt under the summary procedure accordingly fell between two stools and had no right of appeal at all.

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1. Fawehinmi, ibid., citing section 161, ibid.
2. Borrie & Lowe, op.cit., p. 287, emphasis supplied.
3. Ibid.
4. Ibid.
5. Ibid.

The situation was remedied, somewhat belatedly, by section 13 of the Administration of Justice Act 1960 - which provided a general and uniform right of appeal against conviction and sentence for both types of contempt (whether civil or criminal).[1] Provision was thus made for appeals to both the Court of Appeal and the House of Lords; and this innovation has since had great significance. The result has been that many fundamental common law principles of contempt have recently come before the highest courts in England for examination and elucidation; and this has greatly contributed to certainty in the law. However, the fact that criminal contempt has come before these courts on a regular basis only since 1960 has also meant that there has been little opportunity for assessing its deficiencies or for its progressive development to meet the much changed needs of modern times.

## 8.15. Contempt of Court with Reference to the Media

Thus far, certain fundamental principles relating to contempt of court in general have briefly been described. Against this background, it now remains to examine the extent to which contempt law constitutes a restriction on media freedom. Four aspects of contempt of special relevance to the media have previously been identified;[2] and it is now proposed to canvass each in turn.

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1. See ibid., at 288. For further details, see ibid., pp. 287-294; and Miller, op.cit., pp. 37-40.

2. See p. 752.

# MEDIA FREEDOM IN AN AFRICAN STATE: NIGERIAN LAW IN ITS HISTORICAL AND CONSTITUTIONAL CONTEXT

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# CHAPTER NINE

## SUB JUDICE PUBLICATION

### 9.1. The Significance of the Rule against Sub Judice Publication for Media Freedom

The sub judice branch of the law of contempt prohibits, in broad outline, the publication of material likely to prejudice or influence the outcome of proceedings which are either pending or in actual progress. Its significance for freedom of the media is considerable: as perhaps most dramatically demonstrated by recent proceedings in the United Kingdom in which the House of Lords held that the sub judice rule precluded the Sunday Times from publishing an article relating to the 'thalidomide' tragedy - a matter which was clearly of the utmost public concern.[1] Although this judgment was ultimately overturned by the European Court of Human Rights on the ground that it conflicted with the United Kingdom's obligations under the European Convention on Human Rights of 1950,[2] the decision nevertheless graphically illustrates the extent to which the sub judice rule may prevent the media from canvassing issues of great public importance. Moreover, as the Supreme Court in the United States of America has pointed out, the rule exercises its repressive effect at precisely the point in time when public interest in a particular issue - aroused by the institution of proceedings - is at

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1. These proceedings are discussed in detail at p. 779 below.

2. The ruling of the European Court is further discussed in due course. The judgment of the Strasbourg Court also prompted the enactment of the Contempt of Court Act, 1981 (as previously indicated - in Chapter Eight - and further discussed below).

its height.[1]

Furthermore, liability for sub judice publication is 'strict' in the sense that it is the objective likelihood of prejudice resulting which determines liability, rather than the alleged contemnor's subjective intention to bring such a result about. Thus, the net of potential liability is spread extremely wide and extends - as regards the media - to all those involved in 'publication': from journalists and editors, to proprietors, printers and producers, to distributors, news agents and street vendors. Strict liability for sub judice publication also imposes a serious practical restraint on investigative journalism: for the media often cannot be sure whether the police are not also investigating a particular matter: which may then be 'pending' within the meaning of the rule and may not be the subject of comment. Moreover, the issue of a writ clearly brings the matters to which it relates within the ambit of the sub judice restriction, and this may serve to 'gag' further media coverage for a considerable period of time - even though the plaintiff has no intention , at the end of the day, of pursuing the matter in court.[2]

In summary, thus, the sub judice rule places all matters which are the subject of proceedings (criminal or civil) in a "cocoon" for what may be a period of months or even years; and anyone who publishes comment on such issues during this period does so at his peril - being subject to conviction for contempt, not because he intended to (or has, in fact, caused) prejudice to the proceedings, but merely because prejudice,

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1. See p. 855.

2. The common law does, however, take some cognisance of the problem of the so-called 'gagging writ' as further explained at p. 849 et seq.

might, objectively and potentially, have resulted. Furthermore, the period during which proceedings are subject to restriction is a matter of considerable controversy at common law: and this inevitably encourages the media to err on the side of caution and to refrain from comment which may, in law, be quite legitimate. The width of the net of strict liability has been remarked; and it thus needs no further emphasis that the rule - for all these reasons - constitutes a far-reaching restriction on freedom of the media.

## 9.2. The Sources of the Sub Judice Rule in Nigeria

The sources of the law of contempt in Nigeria have previously been canvassed;[1] and suffice it, accordingly, for present purposes merely to note that the provisions of the Codes relevant to sub judice publication are s 133(4) of the Criminal Code (which penalises any act 'capable of prejudicing any person in favour of or against any party to [pending judicial] proceedings')[2] and s 182 of the Penal Code (which prohibits any act, likely or intended, to 'influence the course of justice in any civil or criminal proceedings').[3] However, as emphasised above, the provisions of the Codes are not relied upon in practice; and liability for sub judice publication is accordingly governed primarily by common law principles.

## 9.3. The Rationale for the Sub Judice Restriction

The rationale underlying the sub judice restriction has recently been

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1. See p. 699 et seq.
2. See p. 700.
3. See p. 701.

analysed by the House of Lords in Attorney-General v Times Newspapers, Ltd.,[1] in the following terms:

> 'The due administration of justice requires... that all citizens ... should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and ... that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law....'.[2]

The first of these requirements is self-explanatory. The second has been interpreted to mean that 'other persons [must] desist from prejudging the issues which the court will be called upon to determine'.[3] Both requirements are essential to ensure a "fair" trial: meaning 'a trial conducted free from prejudice and in which the court tries the case impartially after considering all the available evidence which has been properly submitted [to it]'.[4] With the growing power of the media, it has come increasingly to be recognised that the fundamental right to a fair trial may be destroyed if "trial by the media" were to be countenanced; for '[s]uch "trials" ignore the basic rules of evidence and do not provide any right to reply or cross-examine; they tend in short to usurp the power of the court without any of the safeguards

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1. [1974] A.C. 273 (H.L.(E)).
2. Ibid., at 309, per Lord Diplock.
3. C.J. Miller, Contempt of Court, London, 1976, p. 69.
4. G.J Borrie and N.V. Lowe, The Law of Contempt, London, 1973, p. 35.

provided by the rules of criminal procedure and evidence'.[1]

In addition, the need for the sub judice rule is further buttressed by the practical consideration that - were it not to apply - a person in fact guilty of serious crime might well (if his trial had been surroundered by wide-ranging media publicity) be able to have his conviction quashed on the grounds of prejudice to the proceedings, as has, in fact, occured in the United States on certain notable occasions.[2] It is thus considered preferable that freedom of expression should suffer (to the extent that publicity must be limited until after the conclusion of proceedings) rather than that the guilty should go scot-free.

Underlying these reasons for the rule, however, - and the factor which provides its principal rationale - is the susceptibility of lay members of a jury to outside influence. It is apparent that jurors (as opposed to judges and other judicial officers) lack the training and experience required to exclude from their minds irrelevant and prejudicial material relating to a trial (as reported by the media); and to focus their attention exclusively on the legally admissible evidence. There can thus be no doubt (as United States' experience bears out[3]) that adverse media publicity can seriously prejudice a trial conducted by jury. Hence, whenever this mode of trial is adopted, the rationale for the sub judice restriction is readily apparent. Different considerations apply, however, where trial is conducted by trained judicial officer alone: - and here the need for the sub judice rule is open to considerable question. In this regard, it is accordingly worth noting (at the

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1. Borrie & Lowe, ibid., p. 36.

2. These United States' decisions are further discussed in due course.

3. This is further discussed at p. 888.

very outset of this discussion) that jury trial is extremely rare in Nigeria. It has no application at all in civil proceedings; and, in criminal proceedings, is available only in Lagos and then only in relation to crimes subject to capital punishment.[1] Unfortunately, however, the English common law rules have evolved against a background in which jury trial is the norm; and English precedents are heavily premised (in general) upon the need to avoid prejudicing the minds of potential jurors. It is important, therefore, in approaching the topic of sub judice publication, that this difference between the mode of trial in England[2] and Nigeria should always be kept firmly in mind.

## 9.4. The Rule Against Publication Pendente Lite by the Media as Part of a More Wide-Ranging Principle.

The rule prohibiting publication of comment by the media whilst proceedings are 'pending'[3] is simply one aspect of the sub judice rule: which, in turn, is based upon the wide-ranging principle that the "stream of justice"[4] must be kept clear and unimpeded, and must not be diverted from its natural course. It follows that prejudice of any kind to proceedings either pending or in progress must be precluded: and this requires, in broad outline, the insulation of all involved in the judicial process from improper influence. Juries - as previously noted - are considered particularly susceptible to prejudicial publication by the media; and the sub judice rule accordingly attempts to

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1. See T. Akinola Aguda, The Criminal Law and Procedure of the Southern States of Nigeria, 3rd. ed., London, 1982, para. 529.

2. In England, in broad outline, jury trial in civil proceedings is rare, but it still generally applies in criminal proceedings. See Miller, op.cit., p. 125.

3. The meaning of 'pending' is considered further below.

4. This metaphor is one frequently by the courts in the context of contempt, as will be seen in due course.

preclude such influence from arising. However, direct approaches to jurors may be equally (if not more) prejudicial to fair trial; and hence these too are prohibited in terms of the wider sub judice principle (of which the rule against prejudicial publication forms part [1]). Likewise, it has long been recognised that the "stream of justice" may be polluted through attempts to influence a party to proceedings,[2] or a witness in them,[3] or the presiding judicial officer;[4] and each such category of conduct is accordingly likewise prohibited in terms of the sub judice restriction.

In Nigeria, a clear illustration of contempt arising under the sub judice rule through an attempt to influence a party to proceedings is provided by the case of Adekoya v Jakande,[5] in which it was alleged that the respondent had attempted to coerce the applicant into withdrawing a claim pending before the courts by "blacking" his business. The underlying facts are somewhat complex and require brief explanation.

The applicant sought the committal of the respondent for contempt of court on the basis that (whilst proceedings in which the applicant was a party were pending) he, the respondent, as President of the Newspapers Proprietors Association of Nigeria ('NPAN') had written, inter alia,[6]

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1. See Miller, op.cit., p. 94.
2. See Adekoya v Jakande, described below.
3. See Miller, op.cit., pp. 100-105.
4. See Miller, ibid., pp. 105-106.
5. Suit No LD/1138/76, reproduced by Chief Gani Fawehinmi, The Law of Contempt in Nigeria (Case Book), Surulere, Lagos State, 1980, pp 40 - 48.
6. See Fawehinmi, ibid., pp. 40-41, where it is explained that similar letters were sent to all Newspapers' Executives - clearly in order to effect a general "blacking" of the applicant.

to the General Manager of the Daily Express newspaper, calling upon him to implement a unanimous decision of the Executive Council of the NPAN, to the effect that 'no member of the [NPAN] should receive any advertisement from [the applicant's] Press Agency either on credit or cash basis or any terms whatsoever'.[1] The letter also explained that the reason for this was that the Agency was continuing to pursue a legal action against the NPAN, contrary to an agreement between the NPAN and the Association of Advertising Practioners of Nigeria (AAPN) (of which the Agency was a member), whereby the AAPN had undertaken 'to withdraw from Court any legal action against NPAN by any of [its] members'.[2] Since the AAPN had failed to fulfill this agreement and had failed also to expel the offending member, the Executive Council of NPAN had resolved to "black" the Agency concerned. In loyal response to the letter, the Daily Express[3] had duly refused all business from the Agency; and the applicant applied to the court for relief.

The court had little hesitation in rejecting the respondent's submission that publication was an essential element of contempt of this kind and that, accordingly, in the absence of publication,[4] no attempt had been committed. It cited Re Ludlow Charities, Lechmere Charlton's case[5] to

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1. Ibid., p. 41.

2. Ibid.

3. See Fawehinmi, op.cit., p. 42. The Nigerian Herald, equally 'faithful to the decision [of the Executive Council] and loyal to the [NPAN]' did the same.

4. Ibid., p. 43. Counsel for the respondent pointed out that the letters had been sent only to members of the NPAN and contended that this did not constitute publication. Unfortunately, however, for the clarification of the law regarding the elements of publication, this point was not crisply answered by the court as - in view of its interpretation of the contempt, as further explained below - it was not necessary for it to do so.

5. (1837) 40 E.R. 661; 2 My & Cr 316.

the effect that:

> '"Every writing, letter or publication which has for its object to divert the course of justice is a contempt. A threatening letter must be considered as having equally that object, whether addressed to a suitor seeking justice, to a judge or an officer of court"'.[1]

The court referred also to Borrie & Lowe[2] as authority for the proposition that '"Deterring or preventing a party from bringing an action (or attempting so to do) ... is an interference with the due administration of Justice, and amounts to "contempt"'.[3]

The crucial question, therefore, was whether the letters constituted an improper interference in the administration of justice. The court acknowledged that genuine attempts at out-of-court settlement cannot be so construed, but emphasised that where such an attempt is accompanied by a threat, the matter assumes a different complexion. Thus, in Smith v Lakeman,[4] a letter sent to one of the parties to a pending action was held a contempt because it contained a threat to indict the defendant for swindling, perjury and forgery if he proceeded with the action and was thus '"a threat for the purpose of intimidating him as a suitor, and, therefore ... was unquestionably a contempt of court"'.[5]

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1. Ibid., at 670; 339.
2. Op.cit.
3. Ibid., p. 223.
4. (1856) 26 L.J.Ch. 305.
5. Ibid.

Likewise, in Rowden v University Co-operation Association Ltd.,[1] an attempt at coercion (this time against a witness in pending proceedings) was held to constitute a contempt.

Against this background, the court had no doubt that the respondent's letters contained 'a threat for the purpose of intimidating [the applicant], a suitor, and therefore ... was unquestionably a contempt of Court'.[2]

Further support for this conclusion was provided by the case of Attorney-General v Times Newspapers Ltd.,[3] in which Lord Diplock and Lord Simon of Glaisdale had held:

> '"Contempt of Court in a civil action is not restricted to conduct calculated to prejudice a fair trial by influencing the tribunal or the witnesses but extends to conduct calculated to inhibit suitors from availing themselves of their constitutional right to have their legal rights determined by the courts"'.[4]

In addition, Lord Simon had further observed:

> '"Private pressure on a litigant is in general an impermissible interference with the course of justice and can only be justified within narrow limits as when there exists such a common interest that fair, reasonable and moderate personal representation could be appropriate e.g. a genuine, unofficious and paramount concern for the welfare of the litigant"'.[5]

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1. (1881) 71 L.T. Jo 373.
2. See Fawehinmi, op.cit., p. 45.
3. [1974] A.C. 273 (H.L.(E)).
4. See Fawehinmi, supra.
5. See Fawehinmi, ibid., p. 45.

The court had little doubt, however, that the pressure in the present case was not motivated by 'concern for the welfare of Mr Adekoya or Olu Adekoya Press Agency'.[1]

The court emphasised the dangers to the administration of justice implicit in the respondent's conduct. If a particular litigant were deterred from pursuing his legal rights through the courts, this might have a snowball effect and '[l]itigants [generally] would compromise their rights [rather] than have them vindicated and then might would be right in such a society'.[2]

The court accordingly concluded that the respondent's letters were calculated to interfere with the administration of justice and constituted a contempt of court. It thus ordered the respondent to withdraw the offending letters, to instruct all members of the NPAN to stop "blacking" the applicant, to publish a suitably worded apology to the court and to pay costs of ₦ 50.

This case thus provides illuminating insight into the operation of the sub judice rule in its wider context. However, decisions of this kind have only peripheral significance for the media; and it is accordingly proposed to focus attention henceforth on the sub judice rule only insofar as it prohibits publication pendente lite. The first question which arises for examination is the manner in which prosecution for such prohibited publication may be instituted.

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1. Ibid.

2. Ibid., p. 46.

## 9.5. Commencement of Proceedings for Contempt under the Sub Judice Rule.

In keeping with the general principles described above,[1] proceedings for contempt under the sub judice rule may be instituted by applying (with prior leave of a judge) for the committal of the alleged contemnor. Alternatively, the summary process may be instituted by a court of its own motion, as graphically illustrated by the case of Re Onagoruwa.[2]

Here, the proceedings arose out of the publication in the Sunday Times on 13 May 1979 of an article written by Dr Onagoruwa (the appellant) which, in essence,[3] called on all those standing for the presidency in the 1979 elections[4] - and who had not, in fact, satisfied the requirements for eligibility provided by the Electoral Decree of 1977 - to withdraw their candidacy. Proceedings had previously been instituted by one such candidate - Dr Azikiwe - against the Federal Electoral Commission ('FEDECO'), contesting FEDECO's ruling that he (Dr Azikiwe) had failed to pay his tax when due and was accordingly not eligible to stand in the elections. These proceedings came up for hearing before Arake, C.J. on 15 May - two days after the publication of the Sunday Times article. Counsel for Dr Azikiwe rose in court to complain that the article published by the appellant - by purporting to pass judgment on the issues in question - usurped the function of the court and was a blatant contempt.[5]

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1. See p. 715 et seq.
2. Suit No FCA/E/117/79, reproduced by Fawehinmi, op.cit., pp. 270-289.
3. The facts of the case (particularly the content of the impugned article) are further described at p. 773.
4. See the section on the history of Nigeria, at p. 109.
5. This aspect of the decision is discussed further at p. 773 et seq.

Counsel submitted that the appellant should be brought before the court to show cause why he should not be punished for contempt;[1] and Arake, C.J.'s response was that he would 'give [the appellant] time up to Sunday 20th May 1979 to make amends [failing which] proceedings [would] be commenced forthwith against him for him to purge his contempt'.[2]

On 22 May, Arake, C.J. having apparently 'seen no amends of any sort in [the] Sunday Times of 20/5/79, concluded that no steps had been taken to comply with his order'[3] and - regarding this as contempt of his Court - recorded that he would make an order for the immediate arrest of the appellant and for him to be brought before him on the 28th May to show cause why he should not be punished for contempt. It appeared, however, that this order was never formally made and that no warrant for arrest was in fact issued. The Chief Judge's order for the appellant's arrest was, however, widely publicised by the media; and on the 28th, the appellant (accompanied by counsel) accordingly appeared before the court (notwithstanding the absence of any order served on him to do so) 'out of ... respect ... for the judiciary, ... [and] in defence of ... the welfare and freedom of the press'.[4] The submission of counsel for the appellant (denying, inter alia, that the article constituted a contempt) were given short shrift by the learned Chief Judge, who asserted that the article was clearly a contempt of court[5] and ordered that the appellant 'be confined at the prisons at Enugu until such time as he

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1. Ibid., at 285.
2. Ibid., at 286.
3. Ibid.
4. Ibid., at 272.
5. The reasons for this conclusion are further discussed at p.744.

[had] purged his contempt'[1] (in failing to make amends as required) - at which point the court would determine the appropriate penalty for the initial contemptuous publication.

The appellant's appeal to the Federal Court of Appeal was unanimously allowed, by virtue of the procedural irregularities described above[2]. Of significance for present purposes, however, is the disquiet expressed by the Court (per Belgore, C.J.A.) at the manner in which the summary process had been set in train. The proceedings provide a clear example of a court acting ex mero motu: and graphically demonstrate that the result is to merge the roles of prosecutor and arbiter in a single individual, in a manner clearly inconsistent with fundamental principles of natural justice[3]. Thus, as Belgore, C.J.A. stressed, (in graphic if somewhat inelegant terms) the trial had been conducted 'by the Court prosecuting, finding the appellant guilty, [and] sentencing him while the court itself virtually became the accuser'.[4] He accordingly emphasised that '[t]here must be [an] accuser before the Court in contempt ex facie curiae as in R v Jackson[5] ... and R v Ojukoko[6] ...'.[7]

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1. Re Onagoruwa, supra, as reproduced by Fawehinmi, op.cit., p. 280.

2. Most important of these was the failure to serve any order on the appellant or to specify the nature of the amends required.

3. Worse still, the same individual is often also the party aggrieved.

4. Re Onagoruwa, supra, p. 288.

5. (1925) 6 N.L.R. 44, discussed in full in Chapter Ten.

6. (1926) 7 N.L.R. 60, further discussed at p. 769. The important point for present purposes is that proceedings for contempt through sub judice publication were brought by the Attorney-General in both these instances.

7. Re Onagoruwa, supra, p. 288.

It is submitted that there is considerable merit in this recommendation: and that it should be generally accepted and applied in Nigeria, notwithstanding the long line of common law authority in which the capacity of a court to proceed ex mero motu in respect of an alleged contempt ex facie curiae has been acknowledged. Unfortunately, however, Belgore, C.J.A. was the only member of the Appeal Court to refer expressly to this point (though the need for fairness in exercising the summary jurisdiction was emphasised by the entire Bench). It is therefore to be hoped that this important dictum will not be overlooked in future cases; and that it will be generally recognised in Nigeria that fair trial requires, at minimum,[1] that proceedings be instituted by an independent law officer; and that the same individual should not fulfill the roles of both prosecutor and judicial arbiter.

As regards the suggested requirement that the consent of a Law Officer should be needed for the institution of proceedings, it is salutary to note that the Contempt of Court Act 1981, recently enacted in the United Kingdom, indeed introduces a requirement that proceedings for contempt under the 'strict liability'[2] rule (which governs sub judice publication) should be commenced either with the consent of the Attorney-General, 'or on the motion of a court having jurisdiction to deal with it'.[3] There is a certain merit in this provision: although it would have been far preferable if the capacity of the court to proceed

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1. This is recommended as a minimum reform. Further necessary changes in the law are further analysed in due course.

2. This rule is further examined at p. 801 et seq.

3. S. 7, Contempt of Court Act, 1981.

ex mero motu had been excluded altogether - or, at least, confined to instances of contempt in facie curiae. It is accordingly submitted that Nigeria would do well to follow this lead - provided the further amendment is also made[1].

## 9.6. The Type of Publication Prohibited by the Sub Judice Rule

In keeping with its general purpose of preventing prejudice to fair trial, the sub judice rule restricts publications of many different types. Thus, for example, it prohibits the publication of matter likely to be inadmissible in evidence, such as information relating to an accused's previous convictions or misconduct;[2] statements that an accused has confessed to committing the offence charged or has otherwise admitted incriminating facts;[3] or descriptions of the circumstances surrounding the commission of a crime which may be found inadmissible as hearsay.[4] In addition, publications that may affect the weight accorded admissible evidence - by espousing the case of the accused,[5] for example, or of one of the parties in civil proceedings',[6]

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1. This is recommended as a minimum reform. Further necessary changes in the law are further analysed in due course.

2. Miller, op.cit., p. 97; who cites the examples of R v Parke [1903] 2 K.B. 432 and R v Beaverbrook Newspapers Ltd., [1962] N.I.L.R. 15, discussed further below.

3. Miller, ibid., p. 98, citing Clarke, ex parte Crippen (1910) 103 L.T. 636, discussed further below.

4. Miller, ibid., citing the 'Crumbles' case in 1924 in relation to which '[t]hree leading newspapers, which had published the results of their investigations into the circumstances surrounding the death [of Emily Kaye] were ... fined for contempt'. See, also, Evening Standard, ex p. D.P.P. (1924) 40 T.L.R. 833.

5. Miller, ibid., p. 96. citing Onslow's and Whalley's Case where two members of Parliament who took up the cause of the accused and called a series of meetings 'charging that he was the victim of conspiracy' were found to be in contempt.

6. As in the "thalidomide" case, Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 (H.L.(E)), discussed below.

or disclosing that a secret tender or payment of money into court has been made[1] - are also included within the prohibition. So too are publications prejudging the issues in proceedings;[2] or exposing witnesses to improper influences.[3] Space does not permit full examination of all; and it is accordingly proposed to focus on four types of publication which have received particular attention in Nigeria and England.

### 9.6.1. Sub Judice publication directly prejudicial to an accused

A classic illustration of the publication of matter directly prejudicial to the fair trial of a defendant in criminal proceedings (and which would not generally be admissible in evidence) is provided by the Nigerian decision of R v Ojukoko.[4] Here, applications for committal (or attachment) for contempt of court were brought against the editors and printers of three Lagos newspapers (the Daily Times, Nigerian Advocate and Eko Akete). This arose from the publication, in each, of virtually identical articles alluding to a recent theft from Government House, Lagos, and 'stating that the crime had been traced to an ex-convict who had recently been discharged from prison'.[5] The Attorney-General contended that these articles were calculated to prejudice the fair trial of any person charged with the offence and that they accordingly constituted a contempt of court. Tew, J., delivering the

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1. K.W. Stuart, The Newspaperman's Guide to the Law, 3rd ed., Durban, 1982, p. 11

2. As for example, in Re Onagoruwa, supra, as further discussed below; and also in Attorney-General v Times Newspapers Ltd., [1974] A.C.273 (H.L.(E.)), likewise further discussed below.

3. As, for example, in Vine Products Ltd v Green, [1966] 1 Ch 484, further discussed in due course. For this reason, the publication of a photograph of a suspect may also constitute contempt, as it may prejudice a witness in approaching what is always the difficult task of identification. See Miller, op.cit., pp. 103-105.

4. (1926) 7 N.L.R. 60, reproduced in Fawehinmi, op.cit., pp. 240-242.

5. R v Ojukoko, supra, as reproduced in Fawehinimi, op.cit., p. 240.

judgment of the Court, emphasised that it was very likely that the articles in question would have been read by persons called upon to serve as jurors at the trial. Thus 'should the person to whom these paragraphs refer[red] be committed for trial,[1] it [was] almost certain that some at least of the jurors empanelled would take their seats knowing that the accused was alleged to have been previously convicted'.[2] It followed that the articles constituted a contempt of court.

English precedent provides a number of further examples of publications of this nature being found to constitute contempt. Thus, in R v Parke,[3] 'an article in the Star newspaper stating that a person currently charged with forgery had a previous conviction for the same offence was held to be a contempt'.[4] Likewise, in R v Beaverbrook Newspapers Ltd.,[5] the publication of the criminal record of one Robert McGladdery who was about to be arrested on a charge of murder was found to constitute contempt; as was the description in R v Thomson Newspapers Ltd.,[6] of Michael Malik (recently charged with contravening the Race Relations Act 1965 through abusive and insulting language at a public meeting) as having had an 'unedifying career as brothel-keeper, procurer and property racketeer'.[7]

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1. Ibid., p. 241. It seems thus that no person had yet been committed for trial, and this raises, in acute form, the question of when the sub judice rule comes into operation, as further discussed at p. 831, et seq (in relation to criminal proceedings, as here).

2. Ibid.,

3. [1903] 2 K.B. 432.

4. Miller, op.cit., p. 97.

5. [1962] N.I.L.R. 15.

6. R v Thomson Newspapers Ltd., ex p. Attorney-General, [1968] 1 W.L.R. 1.

7. Ibid., at 4.

In addition, in R v Clarke, ex parte Crippen,[1] the Daily Chronicle was found guilty of contempt for 'publishing a statement from a special correspondent suggesting that 'Crippen admitted in the presence of witnesses that he had killed his wife, but denied that the act was murder''.[2] Yet another illustration is provided by the case of R v Evening Standard Co. Ltd., ex parte Attorney-General,[3] in which a reporter for the Evening Standard (who had been attending the trial for murder of a man named Kemp) telephoned to his head office a description of the proceedings which provided the foundation for the following article:

> ...'Mrs Gertrude Darmody, of Spitalfields, Norwich, said at the assizes here today that a man accused of murdering his wife asked her to marry him. Mrs. Darmody said she met Kemp in a public house in September last year'.
> [4]

It transpired, however, that the journalist had been gravely mistaken in his report of the proceedings, for no such statement had been made by Mrs Darmody at all; and similar evidence provided by another witness in earlier committal proceedings had been ruled inadmissible as being irrelevant and prejudicial to the accused. The article was held to constitute a contempt.[5]

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1. (1910) 103 L.T. 636.
2. Ibid, at 637.
3. [1954] 1 Q.B. 578.
4. See Miller, supra, p. 120.
5. The article was also a contempt for another reason: the fact that it misreported court proceedings. Contempt through such publication is further discussed in Chapter Eleven below. The case graphically illustrates the operation of the 'strict liability' principle, and this aspect of the decision is considered further below.

A further illustration - of a somewhat different order - is provided by the case of Attorney-General v English.[1] Here, in October 1981, an article was published in the Daily Mail newspaper, supporting the candidature (in a Parliamentary by-election) of one Mrs Carr, who had been born without arms and was standing on an independent "pro-life" platform, which advocated the 'sanctity of life and the right of every person, however severely handicapped, to be cherished and encouraged to live'.[2] The article warned that the chances of a handicapped baby (such as Mrs Carr herself) being allowed to survive in modern times were slim; and submitted that '[s]omeone would surely recommend letting [such a baby] die of starvation, or otherwise disposing of [it].[3] The article was published on the third day of the trial of an eminent consultant paediatrician for the murder of a newborn baby who was mongoloid: and in which it was contended by the prosecution that the consultant (in accordance with the parents' wishes) had 'administered to the new born child a drug which prevented it from taking nourishment, as a result of which it had died of starvation three days after birth'.[4] The House of Lords was satisfied that the article created 'a substantial risk of serious prejudice'[5] to the fair trial of the consultant (even though he had, in fact, notwithstanding its publication, been acquitted by the jury of attempted murder);[6] and would, accordingly, have found that the

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1. [1982] 2. W.L.R. 959 (D.C.); [1982] 3 W.L.R. 278 (H.L.(E.)). The case's main importance lies, of course, in illustrating the operation of the new Contempt of Court Act 1981. Nevertheless, the content of the article provides a good illustration of material prejudicial to the fair trial of an accused.

2. Attorney-General v English, [1982] 2 W.L.R. 959 (D.C.).

3. Ibid., at 963.

4. Attorney-General v English, [1982] 3. W.L.R. 278 (H.L.(E.)), at 281.

5. This is the formula provided by the new Contempt of Court Act, 1981, as further discussed below.

6. The judge had directed acquittal on the alternate murder charge.

article constituted a contempt: were it not for a new defence[1] which has been introduced into the law in England (in s 5 of the Contempt of Court Act 1981, as further discussed below), but which has no counterpart in Nigerian law.

The rationale for restriction of this kind in instances of trial by jury is reasonably clear (although, as Miller points out, 'there have been a number of striking examples in recent years of cases in which a jury has acquitted in spite of its knowledge of previous conviction'[2]). However, where trial is by judge alone, the reason for restricting publication of this kind falls in large measure away, as further discussed in due course.

### 9.6.2. Publication pre-judging the issues in proceedings

Publications which pre-judge the issues in pending proceedings are considered a contempt of court under the sub-judice rule because they tend to usurp the proper function of the trial court. As example of a publication alleged to constitute contempt on this ground is provided by the case of Re Onagoruwa.[3] Here, the Sunday Times, on 13 May, had published an article written by Dr Onagoruwa ('the appellant') and entitled: '"FEDECO and TAX. It is a matter of law and Public morality not politics"'.[4] The article referred to FEDECO's ruling that Dr Azikiwe had failed to pay income tax 'as and when due' in the preceding

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1. The defences available are further discussed below, and so too is the utility of the new statutory defence in England.

2. Miller, supra, p. 97, citing the examples of the Kray and Janie Jones trials. The case of Attorney-General v English, supra, provides yet another illustration of the principle that juries are not necessarily affected by adverse publicity, for here the jury was clearly not influenced by the prejudicial article when it acquitted the accused.

3. Suit No FCA/E/117/79, reproduced by Fawehinmi, op.cit., pp. 270-289.

4. See Fawehinimi, ibid., p. 277.

three years and was accordingly disqualified from standing as a candidate in the 1979 Presidential elections. It asserted that Dr. Azikiwe - according to FEDECO - had indeed failed to pay his taxes before their due date; and stressed the need (after thirteen years of military rule[1]) for political leaders 'to learn the basic fact that no society can survive on distortion'.[2] In conclusion, it called '[i]n the interest of posterity, [on] those who have not satisfied the requirements of the Electoral Decree[3] [to] withdraw'.[4]

Dr Azikiwe had previously instituted proceedings against FEDECO, claiming declarations that he had indeed paid his tax when due and was accordingly eligible to stand for the presidency. These proceedings commenced two days after the publication of the article and, as previously explained,[5] the presiding judge instituted summary proceedings for contempt (in the highly irregular form described above[6]) against the appellant. When Dr Onagoruwa appeared before him, Arake, C.J. ruled that '[h]aving read the article all over (sic) several times there [was] no other impression one would get other than that the writer intend[ed] to pass judgment of the case before the Court.[7] On appeal, the Federal Court of

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1. See the section on the History of Nigera at p. 97 et seq.

2. See Fawehinmi, supra p. 278.

3. Under the Electoral Decree (no 73 of 1977), no candidate could stand for the presidency unless he had satisfied certain requirements, of which proper payment of income tax was one.

4. See Fawehinmi, supra, p. 278.

5. See p. 764 above.

6. The importance of the various procedural irregularities in the case have been further examined above.

7. Supra, p. 279.

Appeal was more concerned with the procedural irregularities which (the Court held) vitiated the committal for contempt[1] than with the question whether the article in fact contravened the sub judice rule. Certain dicta of Areme, and Belgore, J.J.C.A. provide some guidance, however, in this regard. Thus, Areme, J.C.A. pointed out that '[M]any judicial opinions have been expressed in long line of cases that publication calculated to prejudice the minds of the public concerning a pending action is a serious contempt'.[2] He also cited the dictum of Cotton, L.J. in Hunt v Clark[3] the effect that:

> '"If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that ... would be a very serious attempt to interfere with the proper administration of Justice. It is not necessary that the Court should come to the conclusion that a judge or jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is contempt, and would be met with necessary punishment in order to restrain such conduct"'.[4]

Unfortunately, however, (from the viewpoint of obtaining further clarification of the law relating to publications 'sub judice'), Areme, J.C.A. made no attempt to apply these principles to the publication in question, nor to indicate whether the article constituted a contempt or not.

Belgore J.C.A. emphasised that:

> 'The matter before the Court was a civil one, there was no jury in that Court and

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1. These procedural irregularities are further discussed at p. 765 and 766.
2. Supra, p. 283.
3. (1889) 58 L.J.Q.B. 490.
4. Ibid., at 492.

> it [was] not imaginable that a publication tending to prejudice (sic) the issue would influence the mind of the judge sitting alone he being learned and able to shift (sic) through the evidence and arrive at his own conclusion'.[1]

He further observed that the risk of interference in proceedings by publication had been much reduced in England since the decline of the jury in civil matters and opined that '[a] publication will not grossly affect the hearing the Court (sic) if it is cautious in its treatment'.[2] Unfortunately, however, Belgore, J.C.A. made no attempt to apply these principles to the publication in question and gave no ruling on whether it constituted a contempt.

In conclusion, he stressed the danger of the courts 'unwittingly ... bringing the doctrine [of contempt] itself into contempt',[3] and ruled that the conviction and committal should be set aside.

The judgment thus throws little light on the important question of whether an article of the kind in question 'prejudges the issues' so as to constitute contempt of court. The view of the trial judge was clear; and was not, unfortunately, overruled (in this respect) on appeal. In the latter proceedings, Phil-Ebosie, J.C.A. expressed no view on the matter; Aseme, J.C.A. simply emphasised the long line of authorities confirming that 'publication calculated to prejudice the minds of the public concerning a pending action is a serious contempt'[4] and stressed

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1. Ibid., p. 289.
2. Ibid.
3. Ibid.
4. See ibid., p. 283; and the discussion of Aseme, J.C.A.'s judgment above.

that it is not actual, but likely, prejudice that is important;[1] whilst Belgore, J.C.A. seemed to believe that the likelihood of prejudice (through publication pendente lite) is small - especially where trial is by judge alone (without a jury) and the publication is cautiously phrased.[2]

It is submitted that the article - although it made certain comments on the merits of the proceedings between Dr Azikiwe and FEDECO[3] - should not be regarded as constituting a contempt. It was restrained in tone and its main force consisted in its appeal to those 'who have not satisfied the requirements of the Electoral Decree [to] withdraw'.[4] It might be contended that this appeal ipso facto judged the issues in the case and accordingly constituted a contempt. But this, it is submitted, it to take unduly narrow a view. It must be remembered (as pointed out by Belgore, J.C.A.) that the proceedings were to be tried by a judge alone; and it is highly unlikely that a trained judicial officer would be deflected from a proper assessment of the evidence and issues in the proceedings by an article such as that published in the Sunday Times. Accordingly, there was no 'substantial risk' of 'serious prejudice'[5] to the forthcoming trial - and there should have been no question of the article being held to constitute a contempt.

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1. These dicta would seem to indicate that Aseme, J.C.A. believed that the article did constitute a contempt.

2. This indicates that Belgore, J.C.A. would have held that the article was not contempt. These two conflicting opinions, therefore, provide (unfortunately) little clarity.

3. For example, it stated that 'all payments made during 1978/79 were made after FEDECO had written to all the Presidential candidates (including Dr Azikiwe on February 6 1979)'; and it asserted, accordingly, that 'the taxes for the various years were not paid "as and when due"' - that is, on March 31 of every tax year.

4. See Fawehinmi, op.cit., p. 278.

5. This, of course, is to use the terminology now reflected in the Contempt of Court Act 1981 in the United Kingdom (as further explained below) which provides, it is submitted, appropriate criteria for determining the degree of prejudice required for conviction.

A further illustration of a publication allegedly usurping the function of the court through pre-judging the issues in proceedings is provided by the case of Akinrinsola v The Attorney-General of Anambra State.[1] Here (somewhat unusually) the appellant had been summarily tried and convicted of contempt under s 133 of the Criminal Code (rather than under the common law).[2] The proceedings had arisen from the publication of an article written by him in the Sunday Punch of 13 May 1979[3] in which the appellant had indicated 'the manner in which he thought the Federal Electoral Commission ('FEDECO') should apply the provisions of the Electoral Decree, with particular reference to non-clearance of candidates for election for failure to pay tax'.[4] On appeal, the Federal Court of Appeal stressed that the article constituted no more than a 'general comment' on the issue, and emphasised further:

> 'This apart, judicial opinions are that in a case of a trial by a judge alone, as in this case, it is only rarely that a publication will be held to constitute a contempt under this head, as it is accepted that judges are capable of guarding against allowing any prejudicial matter to influence them in deciding a case unless there is a campaign of pressure (which is not the case here) that is so great that even a judge could not safely be assumed to be unaffected'.[5]

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1. (1980) 2 N.C.R. 17.

2. As previously explained, proceedings under the summary common law procedure preserved by s 6 of the Criminal Code Act are far more the norm.

3. Interestingly, this is the same date as that on which the article in issue in Re Onagoruwa, supra, was published. Clearly, the matter was one of considerable public concern at that time.

4. Akinrinsola v The Attorney-General of Anambra State, supra, at 22.

5. Ibid.

For this reason and one other[1] (not relevant for present purposes), the appeal was allowed.

This decision is greatly to be welcomed: not only for its recognition that comment in general terms does not pre-judge issues and thus usurp the function of the court, but also for its emphasis on the improbability of a judge (as opposed to a jury) being influenced by a publication unless - possibly - it is such as to amount to a 'campaign of pressure'.[2]

Of particular significance in the context of contempt through pre-judgment of issues in pending litigation is the celebrated (or notorious) case of Attorney-General v Times Newspapers Ltd.[3] The underlying facts are well known and, accordingly, are canvassed in brief outline only.

From 1958 to 1961, Distillers (Biochemicals) Ltd. ('Distillers') marketed in the United Kingdom a drug commonly known as 'thalidomide' which was widely advertised as a "safe" sedative for pregnant women. It appeared, however, that quite the converse was true: for some 451[4] babies were born grossly deformed as a consequence of their mothers having taken the drug during the early weeks of pregnancy. 62 children brought claims for damages for negligence against Distillers within the three-year limitation-period prescribed by statute - and these

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1. The appeal was also allowed on jurisdictional grounds: in that the offence had been committed outside Anambra State, and the State High Court accordingly lacked jurisdiction to deal with it under the Criminal Code.

2. Publications which impose improper pressure on a litigant are further considered below.

3. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

4. See the judgment of Lord Denning, M.R. in the Court of Appeal: [1973] 1 Q.B. 710 at 735.

claims were settled, in 1968, by a payment of £1,000,000 to those 62. A further 266[1] were given leave to commence proceedings out of time and it appeared that writs might still be issued by another 123. Appearances to the writs had been entered by Distillers, but no further step in the proceedings had been taken. Considerable legal difficulties lay in the way of the children's claims succeeding. First, the claims were, strictly, time-barred. Secondly, it is by no means clear whether, in English law, an action lies for pre-natal injury to a foetus.[2] Thirdly, it would have to be shown that Distillers had been negligent and this would have involved reliance on extremely complex medical and scientific evidence. The claimants were accordingly reluctant to press the litigation to court: and Distillers were perhaps equally reluctant to risk an adverse finding in trial proceedings. Attempts were accordingly made to reach a settlement; and Distillers proposed the establishment of a trust fund of some £3.25 million to cover the 400 or so claims not included within the 1968 settlement. Not all[3] the parents of the children were prepared to accept this offer, however, and so, by 1972, (some ten years after the occurrence of the tragedy) no compensation at all had been received by the majority of the thalidomide victims.

The editor of the Sunday Times took a keen interest in their plight and collected considerable data on the matter in preparation for a

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1. There appears to be some confusion in the different judgments as to the precise number of suits in fact pending. Thus, for example, Lord Reid (see [1974] A.C. 273 at 292) states that 'By February 1969, 248 writs had been served'. It is submitted that the correct number is not particularly important; and the figure of 266 reflected in the text (and which is derived from the judgment of Lord Denning, ibid.) is given simply to illustrate the magnitude of the thalidomide tragedy.

2. See the judgment of Lord Widgery, C.J. in the Divisional Court: supra at 718.

3. Such unanimous agreement was essential, as Distillers had made it a condition of settlement that all claimants should agree to accept

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series of articles which he proposed to publish in the high-circulation Sunday newspaper with a view to persuading Distillers to offer a more generous sum.[1] On 24 September, 1972, the first article was published. It canvassed the need for a change in the law to impose strict liability upon drug manufacturers and distributors; and queried the adequacy of currently accepted methods of assessing damages. Its 'sting' lay in its final paragraph, which asserted that 'the thalidomide children shame Distillers'[2] and which pointed out that the sum offered in settlement (£3.25m) '[did] not shine as a beacon agains pre-tax profits [the previous] year of £64.8 million and company assets worth £421 million'.[3]

Following publication of this article, Distillers immediately brought it to the attention of the Attorney-General, contending that it constituted a contempt of court. The Attorney-General declined to take action; but did ask the Sunday Times for their observations on this allegation. This prompted the editor of the newspaper to send to the Attorney General for prior "clearance" the draft of an article of a somewhat different nature - one which 'contain[ed] a detailed analysis of the evidence against Distillers [and which] marshal[led] forcibly the arguments for saying that Distillers did not measure up to their responsibility, [although] to be fair, it did also summarise the arguments

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it. The great majority were prepared to do so - possibly out of fear that they would otherwise receive nothing. Five refused to do so; and an unsuccessful attempt was made to compel these five to agree - see In re Taylor's Application [1972] 2.Q.B. 369.

1. The question of the editor's intent is discussed in greater detail at p. 787 below.

2. This passage is quoted in a number of differentjudgments. See, for example, that of Lord Reid, in [1974] A.C. 273, at 293.

3. Ibid.

that could be made for Distillers': and it concluded by stating: 'There appears to be no easy set of answers'.[1]

The Attorney-General thereupon issued a writ against the newspaper claiming an injunction restraining publication of the draft article. The application was heard by a Divisional Court which granted the injunction sought. On appeal to the Court of Appeal, the injunction was discharged; but, on further appeal to the House of Lords, it was restored. Application was then made to the European Commission on the ground that the House of Lords' judgment infringed Article 10[2] of the European Convention of 1950. The Commission found a prima facie infringement, and referred the matter to the European Court of Human Rights which - by a majority of eleven to nine - found that the judgment indeed constituted a violation of Article 10 and that the United Kingdom was accordingly in breach of her obligations under the European Convention.

As this brief summary suggests, many different views as to the legality of the draft article were expressed in the course of the proceedings. There were two main grounds on which the draft article was said to constitute contempt: first, because it tended to prejudge the issue of negligence; and, secondly, because it sought to bring pressure to bear on Distillers in its conduct of the litigation. The first ground is of special relevance for present purposes; and the various dicta expressed on this issue are accordingly canvassed below.

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1. See Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245, para. 63.

2. This Article guarantees freedom of expression, in terms which are substantially similar to the Nigerian Guarantee, for which (of course) it forms the model. See the section on the Nigerian Bill of Rights, at p. 199.

The House of Lords placed particular emphasis on the 'prejudgment' principle. This was especially evident in the judgment of Lord Reid, who went so far as to assert that 'anything in the nature of prejudgment of a case or of specific issues in it is objectionable.'[1] He explained this by emphasising that such prejudgment might not only affect the outcome of the particular proceedings, but might also have far-reaching side-effects, serving to encourage "trial by media" which, in turn, would mean that 'unpopular people and unpopular causes [would] fare very badly'.[2]

Lord Morris of Borth-y-Gest further emphasised that 'the courts ... owe it to the parties to protect them ... from the prejudices of pre-judgment';[3] whilst Lord Diplock likewise stressed that 'there should be no usurpation of the decision-making function of the courts'.[4] Lord Cross of Chelsea reiterated the need to 'maintain the rule that any "prejudging" issues, whether of fact or of law, in pending proceedings - whether civil or criminal - is in principle an interference with the administration of justice'.[5]

Applying these principles to the draft article, the House of Lords was unanimous in holding that the draft article constituted a contempt because it tended to prejudge the issue of Distillers' negligence.

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1. Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 (H.L.(E.)), at 300.
2. Ibid.
3. Ibid., at 307.
4. Ibid., at 309.
5. Ibid., at 322.

Its reasoning in this regard is pithily summarised by Lord Diplock, who stressed that the article 'discussed prejudicially the facts and merits of Distillers' defence to the charge of negligence brought against them in the actions, before these [had] been determined by the court or the actions disposed of by settlement'.[1]

The response of the European Court of Human Rights to the prejudgment issue was radically different. Emphasising that its function was to determine whether the restriction against publication corresponded to a 'pressing social need',[2] (an aspect of the judgment considered further in due course),[3] the European Court stressed that the draft article was balanced in its analysis and 'couched in moderate terms'.[4] Moreover, its conclusion: 'There appears to be no neat set of answers'[5] left the issue of negligence wide open. Accordingly, different readers would have reached varying conclusions on the question of Distillers' liability; and thus - even if some had been disappointed by the ultimate judicial ruling on the question - this would not have had the effect of lowering public respect for the judiciary (especially in the light of the wide-ranging debate on the matter, which had high-lighted the complexities of the issues). In addition, the Court considered that publication of the article (and of any disclaimers Distillers might then have felt

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1. Ibid., at 311.

2. It should be noted that the task of the European Court was to determine whether the restriction contravened the right to freedom of expression guaranteed by Article 10 of the European Convention. Derogation from this guaranteed right is permitted only through laws 'necessary' in a democratic society for the furtherance of certain interests, including the authority of the judiciary. The Court, echoing its earlier judgment in the Handyside case, held that a law is only thus 'necessary' if it corresponds to a 'pressing social need'. Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245, at para. 59.

3. See p. 790 and 871, especially.

4. Supra, at para. 63

5. Ibid.

obliged to make) would have served the positive purpose of putting a 'brake on speculative and unenlightened discussion'.[1]

It is submitted that there is considerable merit in this assessment; and that the House of Lords adopted an unduly narrow approach - especially in declaring that 'any' prejudgment of issues is prima facie a contempt. Their Lordships' application of this principle to the facts was also unduly severe: for it failed to take account of the article's balanced approach and the disclaimer as to 'neat' answers with which it concluded. By contrast, the approach of the European Court of Justice is fundamentally sound. Not only did it acknowledge that the canvassing of matters which form the background to pending litigation may be of vital importance in the general public interest, but it also recognised that the article posed no real threat either to fair trial or to public respect for the judiciary. This pragmatism is to be welcomed: and it should be clearly recognised that prejudgment does not ipso facto constitute contempt - especially where trial is to be conducted by a judicial officer whose training and experience insulates him to a considerable degree from the pressures of public opinion.

Other examples of alleged contempt through prejudgment of issues are provided by the cases of Vine Products Ltd v Green,[2] where - against the background of pending litigation on this point - an article expressing strong support for the view that only products from Jerez are entitled to the name 'sherry' was published in the Daily Telegraph -

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1. Ibid., at para. 66.

2. [1966] 1 Ch. 484.

and Schering Chemicals Ltd v Falkman Ltd.,[1] which concerned a television documentary, describing (inter alia) the tests made and precautions taken by the manufacturer of a controversial pregnancy-test drug which was alleged to have caused deformities in babies. The outcome of both cases is discussed further in due course.[2]

### 9.6.3. Publications which pressurise a party to litigation.

Publications which put pressure on a party to litigation are considered a contempt of court not only because of the influence they may have on the outcome of the particular proceedings, but also because of their tendency to deter other potential litigants from seeking redress through the courts and thereby possibly exposing themselves to similar 'public obloquy'.[3]

The classic example of a publication alleged to constitute contempt on the 'pressure' principle is provided by Attorney-General v Times Newspapers Ltd.[4] Here, it may be recalled, it was the express and acknowledged aim of the editor of the Sunday Times to put pressure on Distillers to increase the amount of compensation[5] it had offered to the 'thalidomide' victims. Thus, in the affidavit submitted by him to the Divisional Court, Mr Evans stated:

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1. [1981] 2 W.L.R. 848 (C.A.).

2. See p. 791 and 793 respectively.

3. This term is one frequently invoked in the Sunday Times case (as discussed below), particularly by the House of Lords.

4. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

5. See p. 780 above, where the settlement offer is described.

> 'I admit that my purpose in seeking to publish the draft article is to try to persuade Distillers to take a fresh look at their moral responsibilities, but I submit that this persuasion is in no way improper. In my judgment, the fate of these children is of great concern, not only to their parents but to the country as a whole'.
> [1]

Both the Divisional Court and the House of Lords, however, took a very different view of the legitimacy of bringing such pressure to bear upon Distillers. The Divisional Court stressed that publication of the draft article 'would create a serious risk of interference with Distillers' freedom of action in the litigation';[2] and this danger was clearly its main reason for granting the injunction sought. In the House of Lords, Lord Diplock emphasised the undesirability of conduct:

> 'that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or facts of his case before they have been determined by the court or the action has been otherwise disposed of'.
> [3]

Lord Diplock also pointed to yet another danger: that if a litigant who seeks to rely on the law as it stands is exposed to public vilification for so doing, the result may be a clamour for a change in the relevant rules; and hence, the substitution of "government by the media" for "government by Parliament" within the area of law concerned. His main

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1. Attorney-General v Times Newspapers Ltd., [1973] 1 Q.B. 710, at 720-721, where para. 26 of Mr Evans' affidavit is reproduced.

2. Ibid., at 726.

3. Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 (H.L.(E.)) at 310.

concern, however, was the 'pressure' principle; and the principal basis for Lord Diplock's conclusion, accordingly, was that the draft article 'held Distillers up to public obloquy for their conduct in relying upon the defence, available to them under the law as it stands, that they were not guilty of negligence'.[1]

Other of the Law Lords attempted to place some limitations on the circumstances in which 'pressure' may be said to constitute contempt. Thus, Lord Reid pointed out that to hold that 'any' pressure amounted to contempt was going too far, as this would render it unlawful 'to seek by fair comment to dissuade Shylock from proceeding with his action'[2] - and this could not be correct. Lord Reid attempted to resolve the conundrum by indicating that 'fair and temperate criticism'[3] of a litigant should be regarded as legitimate. He then, however, felt constrained to add the proviso: except in a case 'involving witnesses, jury or magistrates [where] ... even fair and temperate criticism might be likely to affect the minds of some of them so as to involve contempt'.[4] The result is thus to cast any principle which might otherwise have been distilled from his judgment into a quagmire of uncertainty.

In Lord Diplock's view, the important criterion lies in the distinction between "private" and "public" pressure: the former being quite legitimate, but the latter being unlawful by virtue of the 'public obloquy' entailed.[5] This did not satisfy Lord Simon of Glaisdale, however, who pointed out that:

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1. Ibid., at 313-314.
2. Ibid., at 295.
3. Ibid., at 297.
4. Ibid., at 298.
5. Ibid., at 313.

> 'It is the fact of interference [in the proper administration of justice] not the form that it takes, that infringes the public interest'.
>
> [1]

Accordingly, in Lord Simon's view, private pressure may be equally reprehensible unless justified on some appropriate basis; and he suggested that such justification might be found in 'a common interest', based on ' genuine, unofficious and paramount concern for the real welfare of the litigant', which would render 'fair, reasonable and moderate personal representations ... appropriate'.[2] On this view, thus, a private attempt to dissuade Shylock from his course would constitute contempt, unless motivated by concern for him rather than Antonio! The proposition is somewhat startling.

Some comfort may, however, be derived from the judgment of Lord Cross of Chelsea who doubted whether it would be 'easy or logical'[3] to distinguish between private and public pressure, and considered that the salient criterion was the manner in which pressure was applied. Thus, pressure in the form of misrepresentation or abuse may constitute contempt; but 'if [a] writer states the facts fairly and accurately, and expresses his view in temperate language, the fact that publication may bring pressure - possibly great pressure - to bear on the litigant should not make it a contempt of court'.[4] Applying this principle to the facts, Lord Cross considered the first article[5] published by the Sunday Times

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1. Ibid., at 318, emphasis supplied.
2. Ibid., at 319.
3. Ibid., at 325.
4. Ibid., at 326.
5. Ibid. The contents of this article are briefly described at p. 781 above.

to be legitimate, but - unfortunately - made no ruling in this regard on the draft article (which he had already found to constitute contempt on the prejudgment principle[1]).

The approach adopted by the Court of Appeal and the European Court of Human Rights is markedly different - and, it is submitted, far to be preferred. In the Court of Appeal, Phillimore, L.J. pointed out that Distillers had been pressurising the children's parents to accept the settlement offered; and did not see how the exertion of pressure on the company in return could be unfair.[2] This sentiment was echoed by Lord Denning,M.R., who considered that the pressure on Distillers to increase their offer was 'legitimate in the light of all [the circumstances'].[3] The European Court of Justice took a somewhat different approach; and, in assessing whether there was a 'pressing social need' for restricting publication in order to prevent unlawful pressure, stressed the wide-ranging debate (both in and outside Parliament) which had already taken place on the issue, and doubted whether 'publication of the article would ... have added much to the pressure already on Distillers'.[4]

9.6.4. Publications which influence witnesses in proceedings.

Publications which tend to influence witnesses in pending proceedings are also considered a contempt of court because of the danger that they may affect the outcome of proceedings, and thus pollute the

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1. Ibid., at 324.
2. Attorney-General v Times Newspapers Ltd., [1973] 1 Q.B. 710, at 744.
3. Ibid., at 741-742.
4. Sunday Times v United Kingdom Government [1979] 2 E.H.R.R. 245, para. 63.

"stream of justice".

An example of a publication alleged to constitute a contempt on this ground (as well as its tendency to prejudge the issues[1]) is provided by the case of Vine Products Ltd v Green.[2]

Here Vine Products Ltd (and others) had applied to court for a declaration that they were entitled to advertise and sell their products under the descriptions "British Sherry", "South African Sherry" and so forth, without infringing any right of the defendants in these proceedings, who claimed that no wine which had not been fortified, matured and blended in the Jerez district of Spain could be sold as "sherry". Some time later[3] - when pleadings had been closed and the matter set down for trial - an article was published in The Daily Telegraph which (under the heading "The Truth of Labels") proceeded to opine that 'Sherry, to be fully entitled to the name, should come from Jerez ... [and that] [t]o speak of South African or Cypriot sherry is as anomalous as to speak of Spanish champagne'.[4] Vine Products thereupon instituted proceedings against the editor and proprietors of the newspaper, alleging that they had been guilty of contempt of court 'in causing or permitting a discussion in the public print of the merits of their action'.[5]

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1. See p. 785.

2. [1966] 1 Ch. 484.

3. The writ in the "sherry" proceedings was issued on August 8, 1963 in the Chancery Division of the High Court; and the article was published on June 8, 1965.

4. Vine Products Ltd v Green, supra, at 487-488.

5. Ibid., at 488.

One of the principal grounds on which Vine Products relied in support of its allegation was that 'the article was calculated to prevent witnesses from giving evidence contrary to the views set out in the article'.[1] The court agreed that this was 'the most serious accusation [which could be] levelled at th[e] article';[2] but nevertheless found the alleged risk of prejudice unsubstantiated. Buckley, J. acknowledged that not all the witnesses giving evidence in the proceedings would be experts (that some, on the contrary, would be 'ordinary retailers' not generally considered as falling within the 'expert' category[3]), but nevertheless doubted whether 'this article would be likely to deter any witness whom the plaintiffs might want to call from coming to give evidence in the action, or that it would be likely to colour his evidence if he were called'.[4] The court further emphasised that: 'Th[e] ... [contempt] jurisdiction [is one] which should only be invoked where the risk of the proper administration of justice being interfered with is a real and grave one'.[5] In the particular circumstances, 'so far as interference with witnesses [was] concerned, this [was] not a case in which it could be said that there [was] a real and grave risk that witnesses [would] be either deterred from giving evidence or that that truth or content of their evidence [would be] likely to be affected in any way by what ... appeared in the article'.[6]

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1. Ibid., at 495 and 496.

2. Ibid., at 497.

3. Ibid., at 497. The significance of whether or not the witnesses would all be experts lies in the fact (as argued by the defence) that 'witnesses of that sort [i.e. experts] would not be at all likely to be influenced by such an article as this'. It is accordingly all the more significant that the court was prepared to accept that even lay witnesses would not have been affected.

4. Ibid., at 497, emphasis supplied.

5. Ibid.

6. Ibid.

Another illustration of alleged contempt of this nature is provided by Schering Chemicals Ltd v Falkman Ltd.[1] Here, Schering, the manufacturer of a controversial pregnancy test drug, Primodos, which was alleged to have caused abnormalities in new-born babies, sought an injunction against the screening - at a time when negligence suits against Schering were pending - of a television documentary film which, inter alia, featured one Dr Briggs, who had been Schering's director of research at the relevant period, and who explained 'the investigation which he and other members of the company made ... when the drug came under suspicion'.[2] The injunction sought was granted by the Court of Appeal on grounds irrelevant to the present study;[3] and the significance of the case lies in the dicta[4] expressed by the Court as to whether the film had such a tendency to influence potential witnesses in the pending proceedings as to constitute contempt.

In this regard, Lord Denning, M.R. emphatically declared:

> '... I can[not] see that any witness would be put in any difficulty at the trial. It was suggested that Dr. ... Briggs might be embarassed if he were called as a witness. I do not think so. The commentator was most considerate to him. No trace of his being bullied or treated unfairly. No element whatever of "trial by television"'.[5]

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1. [1981] 2 W.L.R. 848.

2. Ibid., at 857.

3. The Court of Appeal accepted that the film had been made in breach of a duty of confidence owed to Schering, and were therefore not prepared to countenance its screening.

4. Even though the case turned primarily on the breach-of-confidence point, it should be noted the alternate ground on which an injunction was sought was contempt. Accordingly, the Court's dicta on the contempt question are more than merely obiter.

5. Schering Chemicals Ltd v Falkman Ltd, supra, at 857.

Lord Shaw emphasised that '[w]itnesses in an action are [either] credible and reliable or they are not; [and that the accusatorial] system of trial in which evidence is elicited by examination and cross-examination provides the means of demonstrating the character and quality of a witness.[2] Furthermore, the suggestion that 'prospective ... witnesses [might] be deterred or discouraged from contributing their testimony if the documentary contain[ed] material which appear[ed] to be at variance with or in contradiction of what they would have been prepared to say from their actual knowledge'[3] was also an 'unsubstantial objection to producing the documentary',[4] in the light of its balanced and objective treatment.

Both cases demonstrate a sound and practical approach to the risk of witnesses being influenced by media reports. It is submitted that this danger is slight: for expert witnesses are guided by professional competence and integrity, whilst lay witnesses with relevant personal experience are unlikely to have their recollection of events displaced by a contrary media account.

## 9.7. "Strict Liability" for Publication Contravening the Sub Judice Rule

Having identified four types of publication commonly alleged to constitute contempt under the sub judice rule, it is now appropriate to consider

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1. Ibid., at 871.
2. Ibid.
3. Ibid.
4. Ibid.

the test of liability for such publication. The crucial question in this regard is whether subjective intent to undermine the proper administration of justice is a pre-requisite to liability. The answer is clearly in the negative: for the authorities plainly show that it is the objective likelihood of prejudice arising which determines liability, rather than any subjective intent to bring this consequence about. Accordingly, liability under the sub judice rule is "strict" - as further explained in due course. Before turning to examine these cases and the principles which they illustrate, it should, however, be noted that subjective intent is not entirely irrelevant.

### 9.7.1. The relevance of intent to prejudice proceedings

Although, in general, liability is determined by the objective likelihood of prejudice resulting, it is also clear that subjective intent to prejudice proceedings has relevance as regards both conviction and sentence. Thus, actual intent to undermine the proper administration of justice may give rise to liability irrespective of whether prejudice has, in fact, resulted or is likely; whilst the absence of subjective intent may serve to mitigate the punishment imposed.

The first point is well illustrated by the decision in Skipworth's and the Defendant's Case.[1] Here the court found that a public speech had been made 'with the express purpose of prejudicing [a pending] trial by attacking witnesses, and of attempting 'by vituperation' to prevent the Lord Chief Justice from presiding'.[2] In the face of

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1. (1873) L.R. 9 Q.B. 230.

2. Miller, op.cit., p. 160.

such intent, it was irrelevant that the words were unlikely to have had this effect; and that 'no one ... who [knew] anything about it could ever imagine [they] could be effectual at all'.[1]

Intent to influence proceedings includes not only direct intent to do so (as in Skipworth's case, above) but also recklessness as to whether or not such consequence results. Whether the alleged contemnor has been reckless to this extent is a question of fact: to be determined in the light of all the surrounding circumstances. It may be inferred from factors such as those in Bolam, ex parte Haigh.[2] In this case, it may be recalled, the Daily Mirror described Haigh ('later found by the jury to have disposed of his victims with the aid of acid in what proved to be one of the most notorious murder trials of the century'[3]) as a 'vampire'; and proceeded to detail other murders he had committed in the past. The Divisional Court held that the publication surpassed all others in 'the long history of th[is] ... class of case'[4] in its prejudicial effect; and sentenced the editor to three months' imprisonment and the proprietors to a fine of £10,000. These severe penalties reflected the view of the court that the accused had not only been reckless of prejudice to fair trial in publishing the information, but had also wished to sensationalise the matter to maximum effect in the interests of increasing the newspaper's circulation.

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1. (1873) L.R. 9 Q.B. 230 at 236, per Blackburn, J.
2. (1949) 93 Sol. Jo. 220.
3. Miller, op.cit., p. 95.
4. Ibid.

Such findings are rare, however, and - as Miller points out - 'there are few modern English cases in which a court has ascribed such an intention or culpable disregard to persons concerned with the publication of newspapers or with broadcasting'.[1]

As regards the second point - the relevance of subjective intent in determining sentence - it should be noted that punishment is apt to be lighter where prejudicial material has been published without intent to jeopardise fair trial. Thus, for example, in Odhams Press Ltd., ex parte Attorney-General,[2] the Divisional Court emphasised that absence of mens rea was 'not a material or decisive question in the case except as to penalty';[3] and in Evening Standard Co., Ltd., ex parte Attorney-General,[4] the court's decision that the reporter (who had supplied the erroneous report which formed the basis for the prejudicial article published by the newspaper[5]) should not be punished - even though guilty of contempt - was clearly based on the fact that 'he did not deliberately send up that which he knew to be untrue',[6] but had merely been 'confused',[7] owing to ill-health or other reasons.[8]

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1. Miller, ibid., p. 159.
2. [1957] 1 Q.B. 73.
3. Ibid., at 79, emphasis supplied.
4. [1954] 1 Q.B. 578.
5. See p. 771 above, where the content of the article is further described.
6. Evening Standard case, supra, at 586.
7. Ibid.
8. The case of Thomson Newspapers Ltd, ex parte Attorney-General [1968] 1 All E.R. 268 demonstrates, however, that absence of mens rea does not necessarily ensure that the penalty imposed for contempt by publication will be minimal. Here an article prejudicial to the trial of Michael Malik was inadvertently published in the Sunday Times, the system established by the editor to guard against contemptuous publications having failed to operate in the particular circumstances. No penalty was imposed on the editor, but the main publishers, Times Newspapers Ltd, incurred a £5000 fine.

9.7.2. The relevance of intent to publish

The importance of subjective intent to publish material which - objectively - is found to constitute a contempt, is illustrated by the case of McLeod v St. Aubyn.[1] Here, the appellant had loaned his copy of the Federalist newspaper to the local public library of St Vincent (in the West Indies), as the library had not received its usual copy. Unknown to him, the issue contained certain letters which were abusive and derogatory of the chief justice of the colony. He was convicted of contempt[2] by the Supreme Court, and appealed to the Judicial Committee of the Privy Council: which allowed his appeal on the basis that he had 'never intended to publish'.[3]

In general, however, where the narrow intent to publish is present (a test which ipso facto must always be satisfied in relation to printers and others involved in the production and distribution of newspapers or broadcasts) the further intent to prejudice proceedings is clearly irrelevant. Thus, as explained in due course, a printer's or distributor's lack of knowledge of the offending material is no defence to liability.[4]

9.7.3. Authority for the 'strict liability' rule.

As regards Nigerian decisions, authority for the 'strict liability' rule is implicit, rather than express. Thus, in R v

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1. [1899] A.C. 549 (P.C.).

2. He was convicted under the branch of contempt known as 'scandalising' the court, further discussed in Chapter Ten.

3. McLeod v St Aubyn, supra, at 562.

4. See p. 804 et seq (as regards the position of the printer) and p. 803 (as regards that of the distributor).

Ojukoko,[1] the question whether the accused had intended to prejudice the trial of the thief was ignored by the court. Instead, Tew, J. emphasised that '[t]he essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in which the trial must go on'.[2] It is clear from the overall context of this dictum that 'calculated' should be read as meaning 'likely'; and that the test to be applied was accordingly an objective one, which left no room for consideration of the accuseds' subjective intent in this regard.

Some doubt, however, as to whether the test is indeed perceived as objective in Nigeria emerges from the decision of Re Onagoruwa,[3] in which the trial court, it may be recalled,[4] found that the Sunday Times article concerning Dr Azikiwe and the FEDECO ruling constituted a contempt because it gave the unavoidable impression that 'the writer intend[ed] to pass judgment on the case before the Court'.[5] This undoubtedly suggests that subjective intent is an important element in liability: but it should also be noted that the trial judge made no attempt to elaborate this point and that the Federal Court of Appeal did not comment on it at all. Moreover, it is clear that no argument was addressed to the court on this issue, and the decision's value as a precedent in this regard is therefore questionable. Unfortunately, no further light is thrown upon the issue by the Akinrinsola[6] case,

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1. (1926) 7 N.L.R. 60, reproduced by Fawehinmi, op.cit., pp. 240-242.
2. See Fawehinmi, ibid., p. 240.
3. Suit No FCA/E/117/79, reproduced by Fawehinmi, supra, pp. 270-289.
4. See p. 774.
5. See Fawehinmi, supra, p. 279, emphasis supplied.
6. Akinrinsola v Attorney-General of Anambra State, (1980) 2 N.C.R. 17.

in which the Federal Court of Appeal simply ruled that the article in question was too general in its comments to constitute contempt of court.

English common law authorities, however, are unanimous in holding that liability for sub judice publication is strict.[1] The clearest expression of the principle is to be found in the following dictum from the judgment of Palles, C.B., in Dolan:[2]

> 'As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this Court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of Court, if the Court arrives at the conclusion which I have arrived at, that there is a real danger that it will affect the trial'.[3]

This statement (although it emanates from the Irish High Court) clearly represents the English common law as well; and it was expressly followed by the Divisional Court in Odhams Press, Ltd., ex parte Attorney-General,[4] where Lord Goddard, C.J. stated:

> 'The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result'.[5]

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1. This is the view of Miller, op.cit., p. 158.
2. [1907] 2 I.R. 260.
3. Ibid., at 284.
4. [1957] 1 Q.B. 73.
5. Ibid., at 80.

Further, all the cases discussed above (in the section explaining the types of publication which contravene the sub judice rule) provide implicit authority for the principle that liability for contempt under this head is strict. Even Attorney-General v Times Newspapers Ltd.[1] demonstrates this; for the intent underlying the proposed publication was to awaken Distillers' sense of moral responsibility and thereby to induce the company to offer a more generous settlement: rather than to interfere in the proper administration of justice.

Finally, it should be noted that statutory recognition has now been conferred on the strict liability rule by the new Contempt of Court Act 1981 in the United Kingdom. The principle is now defined in s 1 of the Act as 'the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so'.[2] This rule, in terms of the Act, applies only to 'publications' (including 'any speech, writing, broadcast or other communication'[3]) and only to those which, at a time when proceedings are 'active',[4] create 'a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[5] These latter issues (the period during which the rule applies and the degree of potential prejudice necessary for liability) are further discussed in due course. For the present, the practical operation of the strict liability principle requires some examination.

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1. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

2. S 1, Contempt of Court Act, 1981 (1981 c.49).

3. S 2(1), ibid.

4. S 2(3), ibid. The period for which proceedings are 'active' is further discussed below.

5. S 2(2), ibid.

9.7.4. The strict liability principle in general operation

The practical operation of the strict liability principle is clearly illustrated in Nigeria by the case of R v Ojukoko,[1] in which - as discussed above - the editors[2] of the newspapers concerned were found guilty of contempt on the basis of the objective likelihood of the articles prejudicing the minds of potential jurors. In this case, the operation of the rule - though harsh to some degree - does not seem inordinately so. The editors were at least aware of the theft from Government House and could, reasonably, have anticipated that some person would ultimately be charged with the offence; and that his trial might be prejudiced by their reports. However, the strict liability rule has a far wider ambit than this; and extends even to instances in which the alleged contemnor has no knowledge of the proceedings, or is genuinely mistaken in publishing a prejudicial report, or is bona fide motivated by true altruism. Moreover, it renders liable even the 'innocent distributor', who has no knowledge whatever that a publication contains prejudicial material. The net of 'strict liability' thus stretches far and wide, as the following authorities amply demonstrate.

In Odhams Press, Ltd., ex parte Attorney-General,[3] the defendants' lack of knowledge, at the time of publication of an article in The People newspaper, alleging that one Micallef was "up to his eyes in the foul business of purveying vice and managing street women", that Micallef had already been committed for trial on a charge of brothel-keeping, was held irrelevant to their liability for contempt. The court's

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1. (1926) 7 N.L.R. 60.

2. The printers were aquitted for reasons further explained below.

3. [1957] 1 Q.B. 73.

approach is summarised in the following statement of Lord Goddard, C.J.:

> 'It is obvious that if a person does not know that proceedings have begun or are imminent he cannot be writing or speech be said to intend to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which is in fact calculated to prejudice a fair trial'.[1]

In Evening Standard Co. Ltd., ex parte Attorney-General,[2] the fact that an honest mistake had been made by an experienced crime reporter availed neither the reporter himself nor his editor when both were prosecuted for contempt following the publication of prejudicial matter under the erroneous belief that it constituted a report of evidence given by a witness during trial.[3]

In Littler v Thomson,[4] the editor's statement that he 'had published the prejudicial article under the conviction: "that he was advancing and promoting the cause of truth and justice"'[5] was found to be an irrelevant consideration.

In R v Griffiths,[6] the fact that the defendants - distributors in the United Kingdom of the American magazine Newsweek - had no knowledge of (and no reason to suspect) the fact that a particular issue contained

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1. Ibid., at 80, emphasis supplied.

2. [1954] 1 Q.B. 578.

3. Some account of the facts has previously been given at p. 771 above, but to explain these in greater detail, Forrest, a reporter on the Evening Standard had been attending the trial for murder of a man called Kemp. He telephoned a report to his office which formed the basis for an article alleging that a witness at the trial, one Mrs Darmody, had testified that Kemp had told her he was unmarried and had asked her to marry him. No such statement had in fact been made by Mrs Darmody; and it appeared that Forrest had mistakenly attributed to her evidence which he had heard given by another witness, Miss Briggs, at the earlier committal proceedings. This evidence by Miss Briggs had been ruled inadmissible at the trial as being

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material prejudicial to the trial (then in progress) of Dr John Bodkin Adams for murder was again held irrelevant to their liability for contempt. The court rejected the defence of innocent dissemination (drawn, by analogy, from the law of defamation); emphasised that contempt is to be treated sui generis; and based its decision on the 'strict liability rule' laid down in Odhams Press.[1]

### 9.7.5. Practical operation of the strict liability principle in relation to printers

The practical effect of the strict liability principle at common law in relation to the printer of prejudicial material is to render him liable for contempt (if the material satisfies the objective test) irrespective of his knowledge of its content. This harsh result is amply demonstrated by the following authorities:

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(Continued)
unduly prejudicial and irrelevant. It was clear that Forrest had made an honest mistake and that the editor of the newspaper had no reason to suspect the accuracy of the report. A contempt was nevertheless held to have been committed by both parties. See Miller, op.cit., p. 120 and pp. 160-161.

4. (1839) 2 Beav. 129, 48 E.R. 1129 (cited by Borrie & Lowe, op.cit., p. 182).

5. Borrie & Lowe, ibid.

6. R v Griffiths and others, ex parte Attorney-General [1957] 2 All E.R.379

1. See ibid., at 383 and see Odhams case, above. Fines of £50 were imposed on the importers of Newsweek and on its distributors (W.H. Smith & Son) in order 'to emphasise the risk which is run by dealing in foreign publication imported here but which have no responsible editor or manager in the country'. (Supra, at 383). The court further emphasised that it was being expecially lenient in the particular circumstances; but warned that similar leniency might not be shown in future.

In the case of St James's Evening Post,[1] where a printer was charged with contempt, it was argued in her defence that she had no knowledge of the contents of the offending publication. This defence was rejected by Lord Hardwicke, L.C., who emphasised that the printing trade must be exercised 'with prudence and caution' and that 'it is no excuse to say that the printer had no knowledge of its contents'.[2]

In the subsequent case of ex parte Jones,[3] Lord Erskine, L.C. followed the St. James's decision in coming to a similar conclusion; and stressed that:

> '[a]s Lord Hardwicke observes, it is no excuse that the printer was ignorant of the contents....'[4]

In Re American Exchange in Europe, Ltd. v Gillig,[5] Lord Hardwicke's decision was expressly followed by Stirling, J., who held that the foreman printer was 'answerable for publishing the article complained of, although he [was] entirely ignorant of its contents.'[6]

The common law principle is thus clear: and it is accordingly interesting to note the conclusion of Tew, J., in R v Ojukoko[7]) that the printers of the newspapers containing the offending articles had been 'joined

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1. (1742), 2 Atk. 469; 26 E.R. 683.
2. Ibid., (cited by Borrie & Lowe, op.cit., p. 181).
3. (1806), 13 Ves. 237; 33 E.R. 283.
4. Ibid., at 239 and 284 respectively.
5. (1889), 58 L.J. Ch. 706.
6. Ibid.
7. (1926) 7 N.L.R. 60, reproduced by Fawehinmi, op.cit., pp. 240-242.

[in the proceedings] as a matter of form'[1] and should not be penalised in any way. This is plainly contrary to the established authorities; and it is unfortunate therefore that Tew, J. did not elaborate his reasons for this ruling. It seems, moreover, (from the report of the proceedings) that no argument was addressed to the court on this point; and it appears that Tew, J. may not have given full consideration to the issue. It is submitted that his decision was probably correct in principle - as further explained below - but it is unfortunate (from the viewpoint of the decision as a precedent in future cases) that Tew, J. did not examine the question in depth, or attempt to reconcile his conclusion with the English authorities to the contrary.

It is plain that the strict liability principle operates extremely harshly in relation to printers of prejudicial material: and it is submitted that some other test of liability should in future be applied to them - so as to make it clear that their responsibility rests solely on their own subjective intent[2] to undermine the proper administration of justice. But how should such a test be formulated? Borrie & Lowe suggest that a test based upon prima facie responsibility for publication,[3] coupled with knowledge of the contents of the publication, would be appropriate.[4] It is submitted, however, that mere knowledge of the contents of a publication should not be sufficient to visit a printer with liability for contempt. His liability should be governed solely by his own subjective animus to undermine the proper administration of justice - which is by no

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1. See Fawehinmi, ibid., p. 241.

2. 'Intent' includes indirect intent, which connotes recklessness as to whether or not prejudice results from a particular publication.

3. Thus, for example, a printer clearly has prima facie responsibility by the very fact of his trade, whilst a person in the position of the accused in McLeod v St Aubyn, [1899] A.C. 549 (P.C.) - who merely lent his copy of a newspaper to a library - does not.

4. Borrie & Lowe, op.cit., p. 179.

means necessarily established by mere knowledge of content - and nothing short of this specific intent should suffice for liability. It is according submitted that the printer should be acknowledged as simply a secondary party in publication: and that his liability should therefore depend on his knowledge of all legally relevant facts: as explained further below (in relation to the liability of others involved in the process of publication).

### 9.7.6. Strict liability in relation to others in the publication process

From the discussion above, it is clear that the common law imposes strict liability upon both distributors[1] and printers[2] of material which - objectively - is calculated to prejudice pending proceedings. Considerable controversy surrounds the liability of others involved in the production of media reports: such as the editor,[3] proprietor (either corporate[4] or unincorporate[5]) the manager or director of an incorporated proprietor[6] and (in the context of television) the programme contractor[7]; and this question is further examined below.

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1. See R v Griffiths, [1957] 2 Q.B. 192, discussed at p. 803 above. Though this decision involved a large commercial distributor, it is clear that - in principle - liability extends even to the corner-shop news-agent or street vendor.

2. The liability of printers has, of course, been discussed above.

3. See the Odhams Press case, [1957] 1 Q.B. 73 at 80.

4. See R v Thomson Newspapers, ex parte Attorney-General, [1968] 1 All E.R. 268.

5. See Miller, op.cit., p. 177.

6. See Bolam, Ex parte Haigh, (1949) 93 Sol. Jo. 220.

7. See Attorney-General v London Weekend Television Ltd. [1972] 3 All E.R. 1146.

9.7.6.1. The liability of a reporter under the sub judice rule

The three important cases on the common law liability of reporters are the following:

(i) R v Evening Standard,[1] in which the reporter - who had telephoned to his office an erroneous report of the evidence in court proceedings (which formed the basis for a prejudicial article subsequently published in the newspaper) was found guilty of contempt;

(ii) R v Odhams Press Ltd.,[2] in which the reporter - who had not only investigated the underlying facts but had also written the article in the form in which it ultimately appeared in the People newspaper - was held guilty of contempt;

(iii) R v Griffiths,[3] in which the reporter - who merely collected items of news and sent them to New York for decision as to how (if at all) they should be used in Newsweek magazine - was found not guilty of contempt.

The reason for the court's decision in R v Griffiths merits careful note: for this (it is submitted) provides the key to proper understanding of the extent of - and basis for - the liability of reporters in this sphere.

In ruling that the reporter in Griffiths' case was not liable for contempt, Lord Goddard, L.C. emphasised that: 'The offence is not the mere preparation of the article, but the publication of it during the proceedings....

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1. [1954] 1 Q.B. 578. See p. 803, n 3.
2. [1957] 1 Q.B. 73. See p. 802.
3. [1957] 2 Q.B. 192. See p. 803.

It has never been held that a reporter who supplied to his editor or employer objectionable matter which the latter published is himself guilty of contempt'.[1]

The significance of this dictum is discussed further below; but its import should be borne in mind in considering the attempts which have been made by various writers to reconcile these conflicting decisions.

Borrie & Lowe suggest[2] that a distinction should be drawn between three categories of reporter: those whose task is simply to gather information but who bear no responsibility for its final publication; those whose reports are published more or less as they stand; and those who write the 'whole article' themselves. They submit that Griffiths fell within the first category, and so could not be held liable; whilst Forrest (in the Evening Standard case) and Webb (in Odhams case) fell within the second and third categories, respectively - and so could be held liable for contempt (on the strict liability test) on the basis that they had 'caused an article to be published'.[3]

Two objections may be raised against this analysis. Firstly, as pointed out by Miller, the suggested substantive offence of 'causing' prejudicial matter to be published 'amounts to no more than an alternative, and somewhat inelegant, way of describing the liability of one who [is] a secondary party to a substantive offence of publishing'.[4] The second (and perhaps more important) objection to this analysis is that it overlooks the fact that even the third category of reporter (the kind

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1. R v Griffiths, [1957] 2 Q.B. 192 at 202, emphasis supplied.
2. Borrie & Lowe, op.cit., p. 199.
3. Ibid.
4. Miller, op.cit., p. 170.

highest up the ladder of experience and responsibility) has no final decision-making power over the content of a newspaper. This power rests with the editor, who must decide whether or not to include the ' whole article' prepared by his reporter. Accordingly, even the third category of reporter is engaged (to quote from the dictum of Lord Goddard, L.C. in Griffiths' case) in the 'preparation' rather than the 'publication' of prejudicial material.

Miller further points out, with considerable cogency, that the reporter who (like Griffiths) merely cables news items to New York; or who (like Forrest) simply telephones a report to his office, does not ipso facto - through his cable or call - himself interfere with the administration of justice.[1] 'It [is] the subsequent dissemination of the [contemptuous material] amongst the public at large, including members of the jury, which [may] prejudic[e] a fair trial'.[2] The liability - if any - of a reporter (such as Griffiths or Forrest) therefore rests (in Miller's view) on the fact that he is a 'secondary party' in the principal offence of interference with the proper administration of justice through the publication of material likely to prejudice a fair trial. Miller further points out that 'liability as a secondary party requires mens rea in the sense of knowledge of all legally relevant facts, even in an offence which imposes strict liability upon a principal offender'.[3]

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1. See ibid., pp. 169 - 170. In fact, Miller specifies only the instance of Forrest telephoning his office but it is submitted that the same reasoning must apply equally to Griffiths cabling his. The distinction which Borrie & Lowe seek to draw between them - that Griffiths is a 'first category' reporter and Forrest a 'second' does not seem warranted.

2. Ibid., p. 170.

3. Ibid.

Hence Forrest, for example, should not have been held liable since it was accepted that he had made an honest mistake and therefore lacked the necessary mens rea for conviction as a secondary party.

Miller then goes on to query whether the same reasoning can be applied to a reporter who (like Webb, in the Odhams case) is responsible for writing an article in its final form. He submits that it cannot: and that such a reporter 'can fairly be said to have published as a principal offender'.[1] This contention, however, is open to serious question. To use the same analogy as previously applied to Forrest and Griffiths, it is not the writing (even in final form) of a prejudicial article which interferes with the proper administration of justice, but its communication to the public in general (including jurors or potential jurors). Accordingly, there seems no basis for treating the preparation[2] of an article in any different way: and it is thus submitted that the liability of a reporter such as Webb in Odhams case should also be viewed as that of a secondary party - whose guilt depends on actus reus being combined with appropriate mens rea: and not on strict liability.

Arlidge and Eady[3] provide little analysis of the liability of reporters. They appear to assume that 'the author or original reporter of a newspaper article' may be liable as a 'principal offender'[4] - in the sense that he is not vicariously liable, as the editor of a newspaper arguably is.[5] The authors make no attempt to reconcile the conflicting

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1. Miller, op.cit., p. 170.

2. The reader is again referred to the test laid down in Griffiths' case, above.

3. Op.cit., p. 127.

4. Ibid.

5. See p. 814.

decisions, however; nor do they refer to the distinctions (as to category of reporter) drawn by Borrie & Lowe or to the differences (between primary and secondary liability) which Miller attempts to identify. They do, however, suggest - without further elaboration or explanation - that the reporter is indeed subject to the strict liability rule.[1]

It is submitted that the correct solution to the problem lies (as previously stated) in the dictum of Lord Goddard, L.C., and in the distinction he draws between the preparation and publication of prejudicial material: buttressed, however, by Miller's distinction between liability as a primary or secondary party in publication. Thus, it should be acknowledged that a reporter may indeed be held guilty of contempt - irrespective of whether he falls into the first, second or third categories identified by Borrie & Lowe - but that he can only do so as a secondary party in publication: so that his liability must be judged (not according to the strict liability rule) but on whether he has performed the appropriate actus reus[2] with the requisite mens rea.[3] Viewed in this light, the decision in Griffiths' case is correct (though the court's analysis could have been taken further to eludicate the basis of liability, where it exists); but the conclusion in the Evening Standard and Odhams Press cases (that Forrest and Webb, respectively, were guilty of contempt) is wrong - and should not be followed should similar situations arise for decision before Nigerian courts. Instead, it should be recognised (in Nigeria at least) that the liability of a reporter for contempt -

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1. Supra.

2. This would consist, for example, in preparing an article for publication (at the editor's discretion) or in telephoning or cabling information to his office.

3. The mens rea required is the subjective animus to undermine the proper administration of justice: nothing short of this should suffice.

by publication infringing the sub-judice rule is as described above.

9.7.6.2. The liability of an editor

It is clear that a newspaper editor is indeed prima facie liable for contempt (under the strict liability rule) in respect of material prejudicial to fair trial published in his newspaper. Thus, as stated by Lord Goddard, C.J. in the Odhams Press[1] case:

> 'It has always been a tradition of English journalism that the editor takes responsibility for what is published in his paper and this was held to be a rule of law in R v Evening Standard Co. Ltd., ex parte Attorney-General'.[2]

It is recognised that this rule may work harshly against an editor who - in many instances - cannot possibly check either the accuracy or the legal implications of every article compiled by his reporters. It is nevertheless considered justified that this rule should apply, on the basis that 'there must be [some] central responsibility',[3] and that 'men occupying responsible positions should [not] be excused because they themselves were not personally aware of what [has been] done'.[4] In addition, to put the matter yet more simply and cogently 'there is a widely held belief that the ultimate responsibility of the editor for the contents of his newspaper is a necessary corollary of editorial independence'.[5]

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1. [1957] 1 Q.B. 73 at 80.
2. [1954] 1 Q.B. 578.
3. R v Evening Standard, ex parte D.P.P., (1924) 40 T.L.R. 833 at 836.
4. Ibid.
5. Miller, op.cit., p. 174, emphasis supplied.

Whilst it is thus apparent that the editor may indeed be held liable for contempt, the basis for such liability is far from certain. Case authority strongly suggests that the liability is vicarious. Thus, in the Evening Standard[1] case (the only English decision which has examined the basis of responsibility[2]), Lord Goddard, C.J. expressly rejected the contention of counsel that the liability should not be considered vicarious and stated: '[t]he principle of vicarious liability is well established in these cases and must be adhered to'.[3]

It seems, however, that the cases on which his Lordship relied to show the 'well-established' nature of the principle are far from conclusive.[4] In addition, the so-called 'rule' is subject to three-fold objection:

(i) The liability of a reporter is, as discussed above, that of a secondary party in publication; and such secondary responsibility cannot give rise to vicarious liability;[5]

(ii) Vicarious liability has been recognised in the law of tort, for reasons of public policy, in order to ensure that compensation (which is, after all, the object of bringing proceedings) will indeed be paid.[6] Different considerations apply in the context of criminal law, where the object is punishment; and where it has long been recognised that

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1. [1954] 1 Q.B. 578, discussed at various points above.
2. Borrie & Lowe, op.cit., p. 191.
3. Evening Standard case, supra, at 585.
4. See Miller, op.cit., pp. 172-173.
5. See Miller, ibid., p. 173.
6. See Miller, ibid., p. 172.

'the principal is not answerable for the act of the deputy ... [and that] they must each answer for their own acts, and stand or fall by their own behaviour'.[1]

(iii) 'Vicarious liability almost invariably presupposes a relationship of master and servant, or an equivalent relationship such as principal and agent'[2] - and editor and reporter do not stand in such relationship to each other; but are rather 'superior' and 'inferior' servants of the same employer - the proprietor.[3]

Since the editor is, in any event, subject to the strict liability rule, it may be queried whether, in practice, the basis of his liability (whether personal or vicarious) makes any difference. It is submitted, however, that there are important practical reasons for correctly identifying the editor's liability: and for acknowledging that this is indeed personal, rather than vicarious. In the first instance, this must assist him in those instances where the strict liability rule does not (or is thought not) to apply: for example, in relation to the publication of a photograph of a suspect.[4] In addition, it is clear that the statutory defence of 'unintentional publication' (discussed in further

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1. R v Huggins, (1730) 2 Stra. 883, 885; 93 E.R. 915, 917.

2. Miller, op.cit., p. 173.

3. Ibid.: see also Borrie & Lowe, op.cit., p. 193.

4. There is considerable controversy as to whether the strict liability rule applies to the publication of a photograph of a suspect. Some support for the view that 'an element of mens rea or negligence is required' is to be found in Daily Mirror, ex parte Smith, [1927] 1 K.B. 845 where Lord Hewart, C.J. indicated that 'a contempt would not be committed where a photograph is published in circumstances in which it would not be apparent to a reasonable man that a question of identity was likely to arise'. However, a number of Commonwealth cases - for example, in New Zealand - have taken a contrary view. See Miller, supra, p. 162.

detail below[1]) provides a shield against personal liability for publication; but it is by no means certain whether it applies also to vicarious liability.[2] In addition, as pointed out by Miller, an editor ought to be able to rely on the statutory defence by showing that he himself had no knowledge that proceedings were pending and had exercised reasonable care. He should not also have the burden of establishing that his reporter had also fulfilled these requirements. Yet if the editor's liability is considered vicarious rather than personal, there is a danger that the section may be construed as imposing this heavy onus upon him.[3]

9.7.6.3. The liability of a proprietor

The liability of a proprietor is well recognised and established;[4] for example, by R v Thomson Newspapers, ex parte Attorney-

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1. See p.862 et seq This statutory defence does not apply in Nigeria, but there is a need for it to be introduced; and, once this is done, it would be advisable to have clear recognition that an editor's liability is personal, and that he may therefore rely on the defence where he himself satisfies its conditions: irrespective of whether his reporter has also done so.

2. The defence excuses those who 'publish' contemptous material in certain circumstances. If the editor is not acknowledged as a 'publisher' in his own right, he may not be able to invoke the defence.

3. Miller, op.cit., p. 174. Here he submits that: 'The concern should, in other words, be with the state of mind of the editor, and it should not suffice that one of his subordinates associated with the publication failed to exercise reasonable care or even, for that matter, knew that proceedings were pending'.

4. See Borrie & Lowe, op.cit., p. 194, who state: 'A newspaper company is clearly responsible for the contents of its newspaper and ... they will always be held responsible for a contempt by publication'. See also Miller, supra, p. 175, who further points out that 'the proprietor of the newspaper in which the allegedly prejudicial matter is published will almost invariably be the primary target for contempt proceedings'. The reason for this, of course, is not difficult to understand: the proprietor is responsible for putting a newspaper into circulation, and stands to profit by its success. Accordingly, public policy legitimately requires that the proprietor should bear the brunt of any financial (or other) penalities imposed for publishing matter prejudicial to the proper administration of justice.

General,[1] in which a fine of £5,000 was imposed on Times Newspapers Ltd., proprietor of the Sunday Times newspaper. The basis of such liability is, however, a matter of some controversy. Again, the only[2] case in which the point has been considered (that of the Evening Standard,[3] supra) suggests that the proprietor's liability is vicarious.

Substantially the same objections to vicarious liability can be raised in relation to proprietors as apply to editors. The only difficulty which falls away in the case of the proprietor is that the editor and reporter will normally be employees of the proprietor, so that what is generally considered an essential pre-condition for the incidence of vicarious liability[4] will, at least, be satisfied. This objection (in its application to editors) is, however, a somewhat technical one; and the obstacles to vicarious liability that remain - as described above - are of far greater substance and import. Accordingly, some other foundation for liability should be ascertained and generally acknowledged.

In the case of a corporate proprietor[5] an alternative basis for personal - as opposed to vicarious - liability is readily discernible in a doctrine of general application in the field of company law: that of the alter ego.[6] This doctrine stems from the recognition that a company, being an artificial entity with no mind or limbs of its own,

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1. [1968] 1 All E.R. 268.
2. See Borrie & Lowe, p. 194.
3. [1954] 1 Q.B. 578.
4. See p. 815 above, point (iii).
5. The majority of proprietors in the modern world are, of course, incorporated bodies.
6. See Miller, op.cit., p. 177; Borrie & Lowe, op.cit., pp. 195-196.

must act through human beings - some of whom, inevitably, are so closely identified with the company that their actions and intentions may be regarded as those of the company itself. The classic formulation of the doctrine is perhaps that of Lord Reid in Tesco Supermarkets, Ltd. v Nattrass,[1] in the following terms:

> 'A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable.... He is an embodiment of the company ... [and if his mind] is a guilty mind then that guilt is the guilt of the company'.[2]

An individual will only be regarded as the embodiment of the company, however, if he occupies a senior position and exercises a considerable degree of control over the company's affairs - for, as stated by Lord Denning,M.R.,[3] there is an important distinction between those who are 'mere servants and agents' of the company and 'who are nothing more than hands to do the work' and those who control its activities and may be said to represent 'the directing mind and will of the company'.[4]

Applying these principles to a corporate newspaper proprietor, it seems clear that 'an editor can fairly be said to act as the corporation [for]

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1. [1972] A.C. 153 (H.L.(E.)).

2. Ibid., at 170, emphasis supplied.

3. In H.L. Bolton (Engineering) Co. Ltd., v T.J. Graham & Sons, Ltd., [1957] 1 Q.B. 159 (C.A.).

4. Ibid., at 172.

[h]e has traditionally a large measure of independence and ... is in day-to-day control of the publication he edits'.[1] Accordingly, it seems fair to conclude that the incorporated proprietor incurs personal (rather than vicarious) liability for contempt through its alter ego - the editor.

What then of the unincorporated proprietor, to whom the alter ego doctrine cannot be applied? Must his liability be considered vicarious? It is submitted that the answer is in the negative; and that the solution (as suggested by Miller[2]) lies in recognising that the unincorporated proprietor is a secondary party in publication; and that he may therefore be found liable for contempt only to the extent that he can be shown to have had the requisite mens rea (in the form of direct or indirect intent). The alternate solution (proposed by Borrie & Lowe[3]) is to regard such a proprietor as being responsible for 'causing' publication - for it is the proprietor, after all, who 'furnishes the means to carry on the concern and who entrusts the publication to [the editor]'.[4] This suggestion, however, is open to the same objection as previously discussed[5] in relation to the liability of reporters: that it is simply an inelegant way of describing the liability of a secondary party to a principal offence; so that it neither promotes further understanding of the issues involved nor provides any answer to the crucial question of the extent of mens rea required for liability.

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1. Miller, op.cit., p. 177, emphasis supplied.
2. Miller, ibid., pp. 175-176.
3. Borrie & Lowe, op.cit., p. 196.
4. Ibid.
5. See p. 809.

In the context of proprietors in general, it may be queried whether there is any practical significance in recognising liability as personal rather than vicarious. It must be acknowledged that, in many instances, the outcome will be the same - irrespective of the foundation for liability. Thus, where an editor is guilty of contempt under the strict liability rule (and is unable to rely on the statutory defence of 'innocent' publication[1]) - it is clear that the incorporated proprietor will also be guilty of contempt - on either the alter ego principle or that of vicarious liability. However, if the proprietor is not a company but an individual (or partnership), he (or it) will not be liable on the 'personal' test - without the requisite mens rea for liability as a secondary party - but would, of course, be guilty (irrespective of mens rea) if the principle of vicarious responsibility were to be applied. Similarly, if it were shown that the editor had been 'innocent'[2] in publishing (although that the reporter had not), an incorporated proprietor could not be held liable under the alter ego doctrine (as the reporter is too far down the chain of decision-making to be said to represent the mind or will of the company) - but would be found guilty on the principle of vicarious liability. Likewise, the unincorporated proprietor would clearly be guilty of contempt in such circumstances if the vicarious test were applied - but might be able to escape conviction (for lack of the requisite mens rea) if the test of personal responsibility (as a secondary party in publication) were adopted.[3]

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1. See the discussion at p 816 above; and see also the further description of the statutory defence at p. 862 et seq.

2. So as to entitle him to rely on the statutory defence, further described at p. 862, ibid.

3. See Miller op.cit., p. 177; and contrast the somewhat different view of Borrie & Lowe, op.cit., p. 197; and the very confused treatment of this question by Arlidge & Eady, op.cit, p. 127.

In summary, therefore, practical consequences do indeed flow from whether the liability of a proprietor is seen as vicarious or personal; and it is submitted that such liability should clearly be acknowledged as the latter. This is particularly crucial at the present time in Nigeria, where the rigour of the strict liability rule has not yet been tempered by a statutory defence of innocent publication; but it will also be equally important on the introduction of such a provision, for the reasons explained above.

### 9.7.6.4. The liability of a manager or director of an incorporated proprietor

A related question is whether a manager or director of an incorporated proprietor can be held personally liable for contempt; and, if so, on what ground. The principle of separate corporate personality suggests *prima facie* that he cannot be convicted - for it is not he (but the company) who commits the *actus reus* of publishing; and (likewise) it is not he (but againt the company) who employs the editor and other newspaper staff. However, it was indicated by Lord Goddard, C.J. (in *Bolam, ex parte Haigh*[1]), that the directors may *not* be beyond the reach of the law. He thus warned:

> 'Let the directors beware: ... If for the purpose of increasing the circulation of their paper they should again venture to publish such matter ..., the directors themselves might find that the arm of [the] court [is] long enough to reach them and to deal with them individually'.[2]

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1. (1949) 93 Sol. Jo. 220.

2. *Ibid*.

No indication is given by Lord Goddard as to the basis for such individual liability. He may (in keeping with the general thrust of his judgment) have had in mind some further extension of vicarious liability. If that is so, it is submitted that this approach should not be followed and that the difficulties attendant upon vicarious liability in this field should not be compounded. Instead, as Miller proposes,[1] it should be recognised that the directors and managers of a newspaper company are secondary parties in publication; and that they may therefore be found guilty of contempt on this basis - always provided that they have displayed the requisite mens rea.[2] 'For this purpose', so Miller submits, 'it would have to be shown that [such person] had consented to, or connived at, the publication of the prejudicial matter'.[3]

### 9.7.6.5. The liability of those engaged in radio and television broadcasting

The first point to note is the almost complete dearth of authority in this context - a lacuna which seems all the more strange given the powerful impact of these media. Virtually[4] the only decision in this field is that of Attorney-General v London Weekend Television Ltd.,[5] which arose out of the screening by the defendants (programme contractors for the Independent Broadcasting Authority) of a programme highlighting the moral responsibility of the Distillers Company for the thalidomide

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1. Miller, op.cit., p. 178.

2. As previously discussed at p.810 above, liability as a secondary party depends on the presence of mens rea even where the liability of the principal is strict.

3. Miller, supra.

4. For other cases, see Fox, ex p. Mosley, The Times 17 February 1966; and Re C (An Infant) The Times 18 June 1969.

5. [1972] 3 All E.R. 1146.

tragedy. Little guidance on the extent of responsibility for television (and, by analogy, radio) broadcasts can be gleaned from the decision, however, for the court took the view that no contempt had been committed;[1] and hence was not called upon to examine this issue. It is implicit in the judgment, however, that the defendants - as programme contractors - were regarded as proper "targets" for contempt proceedings.

The position of other employees within the broadcasting networks remains obscure. It seems that the same general principles as apply to newspaper publication should be extended by analogy to broadcasting[2] - so that, for example, the producer of a programme (with ultimate responsibility for determining its content) should be treated in the same way as an editor.[3] In many instances, of course, no analogy can be drawn: for example, where an unscripted contemptuous remark is made by a member of the public in the course of a television or radio interview. It is nevertheless submitted, however, that appropriate principles can be derived (by extrapolation) from the rules already discussed. Thus, in the particular example given, the speaker would prima facie be responsible for (and, hence, a primary party in) publication; and his liability would be governed by the strict liability rule. The interviewer, producer and proprietor of the broadcasting service should be liable only as secondary parties in publication - so that their guilt, if any, would depend on their having had the necessary mens rea (as

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1. This was on the ground that it had not been shown that the defendants deliberately intended to influence the proceedings then pending between the thalidomide victims and the company; and that, in the circumstances, a single showing of the programme did not create a serious risk that the course of justice might be prejudiced.

2. This seems implicit in the Magistrates' Courts Act, 1980, s 8(5), which provides that, where a broadcast contravenes s. 8(1) (restricting the reporting of committal proceedings, as described below): liability will rest upon 'any body corporate which transmits or provides the programme in which the report is broadcast and any persons having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical'. See Borrie & Lowe, op.cit., p. 202, and Miller, op.cit., p. 180, n 12.

3. See Miller, ibid.

previously discussed above[1]). The principle of vicarious liability should be eschewed; and guilt, in every instance, should be determined on the basis of personal responsibility. There seems little merit, however, in repetition of what has previously been said in relation to responsibility for newspaper publication; and, accordingly, the position - as regards all three of the major media - is instead summarised in diagrammatic form on the following page.

### 9.7.7 The degree of prejudice required for liability

It remains to consider the degree of potential prejudice required for conviction under the strict liability principle. It is plain that liability under this rule depends on the objective likelihood of prejudice to pending proceedings resulting. But how great a risk of prejudice must be shown? In the first half of the 19th century, it is clear that even the small danger posed by a 'technical' contempt was sufficient to found a conviction. Since then, however, '[a] more restrictive approach [has been] achieved [at common law] through distinguishing between 'technical' contempts and contempts which [are] deserving of punishment'.[2] Thus, in Hunt v Clarke,[3] whilst Cotton, L.J. acknowledged that '[i]t does technically become a contempt if pending a cause, or before a cause even has begun, any observations are made or published to the world which tend in any way to prejudice the parties in the case',[4] he (and the other members of the Court of Appeal) also emphasised that the contempt jurisdiction should not lightly be invoked,

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1. See p. 810.
2. Miller, op.cit., p. 69.
3. (1889) 58 L.J. Q.B. 490.
4. Ibid., at 491-492.

EXTENT OF LIABILITY FOR PREJUDICIAL PUBLICATIONS AND BROADCASTS[1]

| | PRESS | RADIO/TV | |
|---|---|---|---|
| Reporter | Secondary party in publication. Liability depends upon personal mens rea | Secondary party in publication. Liability depends upon personal mens rea. | Reporter |
| Editor | Principal party in publication. Liability governed by strict liability rule | Principal party in publication. Liability governed by strict liability rule | Producer |
| Proprietor | If incorporated: liable for editor's guilt under alter ego doctrine. | If incorporated: liable for producer's guilt under alter ego doctrine. | Proprietor |
| | If unincorporated: secondary party in publication. Liability depends upon personal mens rea | If unincorporated: secondary party in publication. Liability depends upon personal mens rea | |
| Manager/ Director of Incorporated Proprietor | Secondary party in publication. Liability depends upon personal mens rea | Secondary party in publication. Liability depends upon personal mens rea. | Head of Broadcasting services. |
| Printer[2] | Secondary party in publication. Liability depends upon personal mens rea. | Secondary party in publication. Liability depends upon personal mens rea. | Sound Engineer Cameraman Technician |
| Distributor[3] | Secondary party in publication. Liability depends upon personal mens rea. | Secondary party in publication. Liability depends upon personal mens rea. | Distributor |
| | | Principal party in publication. Liability governed by strict liability rule. | Interviewer (Unscripted programme)[4] |
| | | Principal party in publication. Liability governed by strict liability rule. | Interviewee (Unscripted programme)[4] |

1. The position as here set out is, of course, the law as it should be - rather than as it is at present acknowledged to be.

2. The position of the printer has, of course, previously been discussed at p. 804 et seq.

3. The position of the distributor has previously been discussed at p. 803.

(Continued)

and that it should not be applied to a merely 'technical' contempt.[1] This, of course, raises the question of how contempts of this kind are to be distinguished from those indeed deserving of punishment.

The difficulty is perhaps best illustrated by posing the question: 'Is the creation of a remote risk of slight prejudice enough to give rise to liability?' Some solution lies, of course, in the principle de minimis non curat lex - but this by no means provides an answer to all the instances that may arise in practice. Judicial dicta provide some guidance as regards the first question and emphasise, in essence, that there must be a 'real risk' of prejudice.

Thus, for example, in Carl-Zeiss-Stiftung v Rayner & Keeler,[2] Russell, J. emphasised that 'a finding of contempt of court must be based on a solid view of the likelihood of such interference and not on fanciful notions'.[3] As regards the second question, however, (viz., the degree of prejudice required) little guidance can be obtained from the courts. It is significant, however, that the Phillimore Committee recommended the following test: that liability for contempt should depend, in this context, on whether 'the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced'.[4]

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(Continued)

4. Where a programme is scripted, the responsibility of interviewer and interviewee remains the same but, in addition, the producer may be found liable on the basis that he, too, has primary responsibility for publication by virtue of his power to determine the final content of any pre-planned programme. This also, of course, (where the proprietor is incorporated) opens up the possibility of the proprietor being held liable under the alter ego doctrine; or (if the proprietor is unincorporated) means that he may be liable as a secondary party in publication, depending upon his own mens rea.

1. See Miller, supra.

2. [1960] 3 All E.R. 289.

3. Ibid., at 293.

4. The Phillimore Report, Cmnd 5794, 1974, para. 112, emphasis supplied.

This indicates that substantial prejudice is required, but leaves open the possibility that even remote risk of such prejudice will give rise to liability. It has accordingly been submitted by Miller that 'the word 'serious' should qualify both the degree and the risk of prejudice';[1] and it is interesting to note that this recommendation has been adopted in the new Contempt of Court Act, 1981, which provides that:

> 'The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[2]

Such legislation of the United Kingdom is not, of course, operative in Nigeria: where the question remains to be determined in the light of common law principles. It is submitted, however, that the approach of the new English legislation is correct; and that its spirit (if not its exact words) should be followed should the matter arise for decision in a Nigerian court.

However, the utility of adopting this definition of the degree of prejudice required depends, in large measure, on the interpretation placed on the words 'substantial' and 'serious'. In this regard, it is somewhat disturbing to note the attitude evinced by the House of Lords, in Attorney-General v English,[3] in deciding whether an article warning of the prevalence of "mercy-killing" of malformed babies was likely to prejudice the trial (then in progress) of an eminent consultant for causing the death of a newborn mongoloid child.[4] In applying the test

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1. Op.cit., p. 70.
2. s. 2(3), Contempt of Court Act, 1981, emphasis supplied.
3. [1982] 3 W.L.R. 278 (H.L.(E.)).
4. The facts of the case have previously been further described at p. 772.

of 'substantial risk' laid down by the new Act, the Lords ruled that '[i]n combination ... the two words [are] intended to exclude a risk that is only remote'.[1] This dictum is most disturbing: for it creates a clear inference that anything which carries a risk which is more than ' remote' satisfies the first "leg" of the conditions prescribed. It must - of course - still be shown (in terms of the section) that the risk carried is one of 'serious' prejudice or impediment; and, although the House was content to let this word, bear its ordinary meaning,[2] the overall effect of the interpretation adopted by their Lordships must surely be to increase the danger of 'technical' contempts falling afoul of the law. This aspect of the judgment accordingly creates a disturbing precedent for the future: and points a direction which should not be followed in Nigeria.

It is therefore submitted that, whilst Nigeria would be well advised to adopt the statutory formula contained in s 2(2) of the Contempt of Court Act 1981, she should also ensure that the words are given their full weight: and should not allow the requirement of a 'substantial' risk of serious prejudice to be diluted in the manner evidenced by the House of Lords in Attorney-General v English.[3]

### 9.7.8. The relevance of prejudice to proceedings in fact resulting

A further concomitant of the 'strict liability' principle is that the actual occurence of prejudice to pending proceedings is irrelevant to liability. Guilt is governed by the objective likelihood of prejudice

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1. Attorney-General v English, supra, at 286, emphasis supplied.

2. Ibid., at 286. The Shorter Oxford English Dictionary defines "serious" as: 'weighty, important, grave; (of quantity or degree) considerable'.

3. Supra.

resulting: and not by whether this occurs in fact. The point has been pithily summarised in Re B. (J.A.) (An Infant),[1] by Cross, J., as follows:

> 'The mere fact that no harm has been done in th[e] particular case is neither here nor there'.[2]

## 9.8. The Period During Which the *Sub Judice* Restriction Applies

By contrast with the rules applicable in other branches of contempt, the sub judice restriction on publication applies only at certain times: viz., when particular proceedings are either in actual progress (as in Attorney-General v English[3]) or are "pending"[4] (as in Re Onagoruwa[5]) for only during this period can there be any danger of prejudice to the fair hearing of the proceedings resulting. Thus, if proceedings are prospective only in the distant future, or have already terminated, there is no reason to prohibit publication; and the restriction on publication accordingly applies only during the period when the matter in question is under judicial consideration: in other words, is sub judice.[6]

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1. [1965] Ch. 1112.
2. Ibid., at 1123.
3. [1982] 3 W.L.R. 278, (H.L.(E.)). Here, publication occurred during trial.
4. The meaning of 'pending' is discussed below.
5. Suit No FCA/E/117/79, supra. Here the article was published two days before the start of the hearing.
6. Hence, of course, the name given to the rule. As indicated above, different considerations apply in other branches of the law of contempt. Thus, 'scandalising' the court constitutes contempt at any time, irrespective of whether the comment is made in relation to particular proceedings. Likewise, misreporting court proceedings, or refusing to answer questions in court, is a contempt ipso facto, and the time at which it is done is irrelevant to liability.

Whilst the principle that the sub judice prohibition applies only during a limited period is thus clear, considerable controversy surrounds the question as to when precisely restriction should begin and end. As regards the correct commencement point (a particularly difficult question), it must always be remembered that the aim of the rule is to prevent prejudice to fair trial. Hence, as soon as a risk of prejudice arises, the rule - in principle - ought to come into operation. But how can it be know when such prejudice is likely? Once some objectively ascertainable step is taken (such as the arrest of a suspect or the issue of a writ), it is, of course, to be expected that proceedings will commence at some future time; and restrictions on reporting may thereupon seem appropriate in the interests of ensuring a fair trial. But it must also be acknowledged that a barrage of adverse publicity could be equally prejudicial to the fair trial of a man who has not yet been arrested, but is taken into custody some time later.[1] It must also be remembered that civil proceedings may take years to come to court (as the 'thalidomide' case graphically demonstrates), and - in such event - the need for restriction seems highly questionable. This raises the question whether factors such as 'arrest' or 'the issue of a writ' are either sufficient or appropriate for setting the sub judice rule in motion. The difficulty has been compounded in recent years by the enormous growth of mass communications with their vast potential to influence public opinion: and since this is largely a phenomenon of the post-war[2] period, it is not altogether surprising that the common law is still struggling to resolve the conundrum.

This difficult issue must now be examined; and, as different considerations apply to criminal and civil proceedings, it is accordingly

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1. The example of the "Yorkshire Ripper", in the United Kingdom, clearly illustrates the danger.

2. That is, from 1945.

proposed to canvass each in turn and to suggest some ways in which the problem may be resolved.

### 9.8.1. Commencement of the sub judice rule in relation to criminal proceedings

During the nineteenth century, there was little discussion in judicial decisions of the appropriate commencement point for the sub judice rule. The cases show a gradually increasing awareness of the need for the rule in 'pending' proceedings, as well as those in actual progress. The most important early case[1] is that of the St James Evening Post[2] (1742), in which Lord Hardwicke pointed out that: '"There may also be a contempt of this Court in prejudicing mankind against persons before the cause is finally heard"'.[3] Further developments are summarised by Borrie and Lowe[4] as follows:

> 'Throughout the nineteenth century the question of the timing of publications was never really considered. However, even though it was not necessary to the decision, the judges often used the formula that there would be a contempt where there were words published or acts done which prejudiced "pending" proceedings'.[5]

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1. This assessment of the importance of this case is that of Borrie & Lowe, op.cit., p. 130.
2. (1742), 2 Atk. 469; 26 E.R. 683.
3. See Borrie & Lowe, supra, pp. 130-131.
4. Ibid., p. 131.
5. Ibid.

9.8.1.1. The "pending" principle.

The meaning of 'pending' was slowly defined; and the concept was also considerably widened by three decisions of particular significance.[1] These were Parke, ex parte Dougal[2] (which established that the sub judice restriction applies where an accused has been remanded in custody but has not yet been committed for trial)[3]; Davies, ex parte Hunter[4] (which indicated that it also applies where an accused has been remanded in custody but has not yet been charged with the crime in respect of which proceedings are ultimately instituted);[5] and Clarke, ex parte Crippen[6] (which held that 'criminal proceedings [are] certainly pending from the time when a suspect [is] under a warrant').[7] Although there is no clear English authority, it seems - both on principle and in the light of Australian precedent[8] - that the same should apply where an accused has been arrested without a warrant. Dicta in the Crippen case suggest that proceedings may also be 'pending' from the time of issue of a warrant[9] - or even, possibly - on 'the

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1. See Miller, op.cit., p. 73.
2. [1903] 2 K.B. 432.
3. See Miller, ibid., p. 74.
4. [1906] 1 K.B. 32.
5. See Miller, ibid.
6. (1910) 103 L.T. 636.
7. Miller, ibid.
8. James v Robinson, (1963) 109 C.L.R. 593, discussed further below.
9. Thus, Pickford, J., for example, stated obiter that: 'There is ample authority for holding that the prosecution has begun at the time, at any rate, when the warrant is issued'. See Clarke, ex parte Crippen, (1910) 103 L.T. 636 at 640. See also the other dicta cited by Miller, op.cit., pp. 74-75.

swearing of an information upon which no further steps ha[ve] been taken'.[1] Likewise, it is possible (though there is no judicial authority in this regard) that proceedings may be 'pending' where a suspect is merely 'helping the police with their enquiries' or is still being pursued by the police, and has not yet been apprehended.[2]

9.8.1.2. The 'imminence' principle

It has come increasingly to be realised, however, that the 'pending' principle may not afford sufficient protection against prejudice to fair trial. In an age of wide-spread and instantaneous mass communications, it is quite possible for a barrage of adverse publicity to create a climate of prejudice against the perpetrator of a particularly heinous crime (such as a multiple murder or brutal rape), long before any suspect is arrested.[3] Hence, it has been suggested that the test should be widened: and that the sub judice restriction should begin to bite as soon as proceedings are 'imminent'. Authority for the imminence principle at common law is somewhat sketchy, however, as indicated below.

9.8.1.3. Authority for the 'imminence' principle.

In Nigeria, the case of R v Ojukoko[4] is clear (if possibly inadvertent) authority for the 'imminence' test. Here, it may be recalled, the

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1. Clarke, ex parte Crippen, at 641, per Lord Coleridge.

2. See Miller, supra, p. 75.

3. Cases in the United States where this has occurred are examined further below. In the United Kingdom, the case of the "Yorkshire Ripper" (as noted above) clearly illustrates the risk.

4. (1926) 7 N.L.R. 60, discussed at p.769 above, where the facts of the case are given in more detail.

articles found to constitute contempt were published shortly after the discovery of the theft from Government House, and before any suspect had been arrested. It is clear, however, that Tew, J. was satisfied that the sub judice rule was already in operation: and this could only have been on the basis of the 'imminence' principle. Unfortunately, however, Tew, J. paid no particular attention to this issue in the course of his short three-page judgment; and it may well be that he simply overlooked the importance of the 'pending' principle at common law. Be that as it may, the judgment is undeniably sound in principle:[1] for there is no particular magic in the fact of arrest so as to render prejudicial publicity beforehand innocuous, and the same coverage thereafter fraught with danger.

Apart from this decision, it is difficult to find clear authority for the 'imminence' principle at common law. Such authority as exists appears to be limited to the following:

(i) It is noteworthy that s 11(1) of the Administration of Justice Act 1960 - which was introduced to provide a defence against 'unintentional' contempt, as further explained below (and which has now been repealed and replaced by s.3 of the Contempt of Court Act, 1981), applied to publications connected with any proceedings 'pending or imminent'.[2] Accordingly, in the Northern Ireland decision in Beaverbrook Newspaper Ltd.[3] - which is, not, of course, binding in English law - the Daily Express was found to be in contempt of court

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1. This is, of course, on the assumption that adverse publicity can prejudice fair trial. Whether this is in fact so (especially where trial is not by jury) is canvassed further below.

2. See s 11(1), Administration of Justice Act, 1960, emphasis supplied.

3. R v Beaverbrook Newspapers Ltd., [1962] N.I.L.R. 15.

for publishing the previous criminal record of one Robert McGladdery, (who was described as the 'No 1 suspect' in relation to a recent murder) at a time when McGladdery was under constant surveillance, with police officers guarding both the front and rear of his house.[1] The clear inference from this decision is that the court accepted - on the basis of the wording of s 11 - that the sub judice restriction indeed applies to 'imminent' proceedings. Since this decision is not binding on the English courts, however, the significance of the section remains controversial.[2] Commentators have pointed out[3] that the legislation was intended to do no more than fill a gap in the available defences for contempt; and that it should not therefore be construed as having effected a major change in other aspects of the law. This consideration is itself ambiguous, however. It may thus imply that no substantial change to the 'pending' principle was effected by the enactment of the legislation (notwithstanding its use of the word 'imminent'). Alternatively, it may be taken as 'furnish[ing] strong evidence that Parliament [in fact] assumed that in using the word "imminent" it was describing the then existing law"'.[4]

(ii) A dictum of the Court of Appeal in Savundra's case[5] is also of considerable importance in this regard. Savundra appealed against his conviction for fraud on the basis that his trial had been prejudiced by a television interview conducted by David Frost shortly before his (Savundra's) arrest. Commenting on this interview, Salmon, L.J. stated:

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1. See, Miller, op.cit., p. 77.

2. The provision no longer forms part of English statutory law; but insofar as it may be taken to reflect the common law, it remains of some importance.

3. See Borrie & Lowe, op.cit., p. 136; Miller op.cit., p. 77, citing Professor Goodhart in (1964) 80 L.Q.R. 166.

4. Goodhart, ibid., p. 168. (Cited by Miller, supra).

5. R v Savundranayagan and Walker, [1968] 3 All E.R. 439.

> 'It must not be supposed that proceedings to commit for contempt of court can be instituted only in respect of matters published after proceedings have actually begun. No-one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial'.[1]

This dictum is by no means conclusive, however, for - as Borrie and Lowe point out - 'powerful though this statement is, it can only be regarded as obiter since the case concerned an appeal by Savundra against conviction and not [proceedings for] contempt against David Frost'.[2]

(iii) In the Scottish decision of Stirling v Associated Newspapers,[3] the Scottish Daily Mail was found guilty of contempt for publishing certain information regarding a person who 'had been detained by the English police in connection with a double murder in Edinburgh ... [but had not yet] been charged or arrested'.[4] The case is of doubtful authority in common law, however, not only because of its Scottish origin, but also because it suggests[5] that the sub judice rule begins to

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1. Ibid., at 441.

2. Borrie & Lowe, supra, p. 137.

3. [1960] S.L.T. 5.

4. Borrie & Lowe, op.cit., p. 137. There appears to be some doubt as to whether he had, in fact, been arrested. See, Miller, op.cit., p. 76. If this was indeed the case, or if a warrant had in fact been issued, then the decision would, in any event, fall within the ambit of the 'pending' principle.

5. See the dictum of Lord Clyde (supra, at 8), to the effect that 'once a crime has been suspected and once the criminal authorities are investigating it, they and they alone have the duty of carrying out that investigation'.

operate 'as soon as criminal investigations [are] in progress and this is certainly not the law in England'.[1]

(iv) The Report of the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry,[2] published in 1969, also provides some support for the imminence rule (albeit in a different context from court proceedings) by stating that:

> 'Although there have been differences of opinion expressed on this subject the better view seems to be that as far as criminal proceedings are concerned the law of contempt bites when such proceedings are imminent'.[3]

9.8.1.4. The 'imminence' principle rejected under common law.

Against the authorities described above must be weighed the only decision in which the common law on this question has been fully and directly canvassed. This is the Australian case of James v Robinson,[4] in which High Court rejected the 'imminence' principle and held that the sub judice restriction applies only when proceedings are 'pending'. In this case, a gunman - who had shot two people in Perth - made his escape from the scene of the crime and then 'became the subject of a massive manhunt, the police concentrating their search in a nearby pine plantation'.[5] During this period and before his capture and arrest, an article was published in a newspaper identifying the gunman

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1. Miller, op.cit., p. 76.
2. Cmnd 4078. The Committee was here concerned with ascertaining the rule in court proceedings, to decide if it should govern tribunals as well.
3. Ibid., para. 22, p. 9.
4. (1963) 109 C.L.R. 593.
5. Borrie & Lowe, supra, p. 138.

by name; and proceedings for contempt were instituted.

The only ground on which the sub judice rule could be said to have been infringed - in the circumstances - was that the publication was prejudicial to proceedings which were 'imminent'. The question whether the rule applies in these circumstances (or only where proceedings are in progress or pending) thus arose directly for decision - by contrast with the cases earlier discussed where judicial statements have either been obiter[1] or based upon assumption rather than close analysis.[2] The decision is accordingly of considerable importance - especially in view of the respect usually accorded to the judgments of the High Court of Australia. The court's conclusion, however, was that the sub judice restriction does not apply to 'imminent' proceedings; and this - both in principle and on the particular facts - is open to serious criticism.

The decision in James v Robinson has been comprehensively reviewed by Borrie and Lowe,[3] whose criticism can perhaps be reduced to two major points:

(i) the Australian court assumed (to a greater extent than is warranted) that the turn-of-the century English cases earlier discussed established conclusively the proposition that 'the offence of contempt could not arise unless proceedings were "pending"'.[4]

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1. As in Savundra's case supra, and - arguably - in Stirling v Associated Newspapers, supra, (depending on whether the accused had in fact already been arrested or, at least, on whether a warrant had previously been issued for his arrest).

2. As in the Beaverbrook case, supra.

3. Op.cit., pp. 130-142.

4. Borrie & Lowe, ibid., p. 140.

(ii) it overlooked the underlying rationale for the sub judice restriction - which is to ensure fair trial - and over-emphasised the anomaly that the 'imminence' principle may lead to the prohibition of publication even though - in the end - no suspect is ever brought to trial.[1]

9.8.1.5. The difficulties in applying the 'imminence' principle

The principal difficulties in applying the 'imminence' principle are two-fold: and relate, first, to the uncertainty of what is meant by 'imminent'; and, secondly, to the extent to which account must be taken of the knowledge of hindsight.

(i) Attempts to define the meaning of 'imminent' succeed mainly in illustrating the difficulty of doing so. Thus, for example, during the House of Lords debate on the Administration of Justice Bill in 1960 Viscount Kilmuir, L.C. stated that: 'Proceedings may be imminent for example, when no one has yet been charged with a crime but an arrest is hourly expected'.[2] In Beaverbrook Newspapers Ltd., Shiel, J. suggested that the word means 'impending' or 'threatening'; and, pointed out that this is 'indeed [its] standard dictionary definition'.[3] A further dictum from debates in the House of Lords (that of Sir Elwyn Jones, speaking as Attorney-General) suggests that the test will be satisfied where '[a] newspaper ought reasonably to have been aware of the likelihood

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1. This difficulty in the application of the 'imminence' principle is further discussed below.

2. Hansard, H.L. Deb. vol. 222, col. 252, 24 March 1960, emphasis supplied.

3. Miller, op.cit., p. 81.

of a very early arrest'.[1] The Report of the Interdepartmental Committee on the Law of Contempt As It Affects Tribunals of Inquiry emphasises the difficulty of defining 'imminent' but concludes that: 'There are cases, however, in which it is obvious that a certain individual is on the point of being arrested on a serious criminal charge - perhaps in 24 hours, perhaps in seven or eight days; it is impossible to lay down a precise scale'.[2] In Savundra's case, Salmon, L.J. - referring to the David Frost interview - indicated that 'it must surely [have been] obvious to everyone [then] that [Savundra] was about to be arrested and tried'.[3]

All these tests emphasise that proceedings (in the form of an arrest at least) must be foreseable in the reasonably near future. At the other end of the scale, therefore, is the suggestion of Lord Clyde in the Scottish case of Stirling v Associated Newspapers that the sub judice rule may come into operation as soon as 'a crime has been suspected and ... the criminal authorities are investigating it'.[4] Miller[5] dismisses this case as being 'of little value in ascertaining the position in English law'[6] - but Borrie and Lowe are considerably more circumspect and believe that 'Lord Clyde's statement cannot be

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1. Hansard, H.C. Deb. Vol. 776, col. 1728, 31 January 1969.
2. Cmnd. 4078, 1969, para. 22.
3. R v Savundranayagan and Walker, [1968] 3 All E.R. 439 at 441.
4. [1960] S.L.T. 5 at 8.
5. Op.cit.
6. Ibid., p. 76.

summarily dismissed'.[1] If this view should prevail, the test of 'imminence' would be wide indeed.

(ii) The difficulty of defining 'imminent' is compounded by the question whether (and at what point in time) account should be taken of the knowledge of hindsight. Savundra's case, for one,[2] clearly demonstrates this difficulty. It may be recalled that Lord Salmon, L.C. expressed the view that it must have been 'obvious' (at the time of the television interview) that Savundra was about to be arrested. In fact, 'several months elapsed before an arrest was carried out'.[3] Should the wisdom of hindsight therefore be taken into account in determining liability for contempt?

It is interesting to note that this difficulty was one of the main reasons for the rejection by the Australian High Court in James v Robinson[4] of the suggested test of imminence. In the court's view:

> 'If a publication is to constitute contempt at all it must be a contempt at the time it is made ... [and] [i]t would be an astonishing state of affairs if a person responsible for a publication were to be held guilty or not guilty according as proceedings should or should not be commenced thereafter'.[5]

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1. Borrie & Lowe, op.cit., p. 139.

2. As Miller, op.cit., p. 81, points out: 'The suspect may succeed in avoiding capture by whatever means, as is currently the case with Lord Lucan; or the investigating authorities may take months to assimilate sufficient evidence to warrant a decision to prosecute, as in the Poulson case'.

3. Miller, ibid.

4. (1963), 109, C.L.R. 593.

5. Ibid., at 607.

A practical solution to the problem is, however, suggested by Miller[1] who proposes that - although the likely imminence of proceedings at the time of publication should remain the principal criterion in determining liability - it should also be possible to take knowledge of subsequent events into account. In his view:

> '[I]t is clear that if subsequent unforeseen developments create an element of prejudice which was not intrinsically likely or intended at the time of publication no liability will be incurred. Equally, however, ... D [will] not be liable when he publishes material prejudicial to the ultimate fair trial of P where P's arrest [is] apparently imminent, although not so as a matter of reality'.[2]

In illustration of his proposition, Miller posits the following two situations:

(i) the suspect, contrary to all expectations, is not in fact - at the time of publication - in the hide-out which the police have surrounded;

(ii) the suspect is present in the hide-out at the time, but - contrary to all expectation - manages to escape and remains at large for a number of months.

Taking an objective view in each instance (based upon reality rather than subjective perception), proceedings - at the time of publication (when the suspect is thought to be or is in fact surrounded by the police) - are not imminent at all in situation (i) but are so in situation (ii). If Miller's suggestion is adopted, it follows that there should be no liability for contempt in either instance. Unfortunately, however,

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1. Op.cit.

2. Ibid., pp. 81-82.

Miller's own reasoning becomes somewhat obscure at this point; and his final submission suggests that he is not prepared to follow his own suggestion to its logical conclusion. Thus Miller further states that '[a] contempt might be committed though the proceedings were ultimately dropped, or if the suspect died before trial or, indeed, if, having escaped, he was never subsequently caught'.[1] Yet this is surely a classic illustration of the situation which Miller begins by saying should not attract liability for contempt - that is, where '[D] publishes material prejudicial to the ultimate fair trial of P where P's arrest was apparently imminent, though not so as a matter of reality'.[2] It is submitted, accordingly, that the true solution lies in Miller's initial proposition; which must, however, be taken to its logical end. Hence, the test of 'imminence' (if adopted at all) should be applied with reference not only to the circumstances known (or believed) to exist at the time of publication - but also with due account of subsequent events.

9.8.1.6. The test of 'imminence' rejected by the Phillimore Committee

The test of 'imminence' was rejected by the Phillimore Committee, primarily on the grounds of its uncertainty and difficulty of application; and also because there is frequently a considerable delay between arrest and trial, so that prejudicial matter published before arrest will be likely to have faded from memory before the matter comes to court.[3] There is considerable force in these contentions, though the

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1. Miller, ibid p. 82.
2. Ibid., and see also the previous quotation of this submission above.
3. The Phillimore Report, Cmnd. 5794, paras. 115-132, especially at para. 122.

Committee possibly exaggerated the difficulties of applying the imminence test[1] and failed to take adequate account of the "Yorkshire Ripper" type of situation, in which public outrage may act as a spur to memory for a considerable period of time. Be that as it may, the Committee's recommendation was that the sub judice rule should begin to operate in England and Wales from the time when [a] suspected man is charged or a summons served'.[2]

9.8.1.7. Commencement of the sub judice rule in criminal proceedings under the new Act.

Under the Contempt of Court Act, 1981, the recommendations of the Phillimore Committee have been given statutory effect, and the sub judice rule, in relation to criminal proceedings, now begins to operate (in England and Wales) either on arrest without warrant[3] or on the service of an indictment or other document specifying the charge.[4] At such point, in the terminology of the new legislation, the proceedings become 'active'[5] and any 'publication'[6] which creates a 'substantial risk' of 'serious' 'prejudice or impediment'[7] to their fair trial is punishable as contempt.

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1. See the discussion above, as to the way in which the 'knowledge of hindsight difficulty'can be overcome.
2. See the Phillimore Report, supra, para. 123.
3. Para. 4(a), Schedule I, read with ss 2(3) and (4), Contempt of Court Act, 1981.
4. Para. 4(d), ibid.
5. See s. 2(3), Contempt of Court Act, ibid.
6. See s. 2(1), ibid., where 'publication' is defined.
7. See s. 2(2), ibid.

9.8.1.8. The test to be applied in Nigeria.

At common law, the test generally accepted is the 'pending' principle, as emphasised in James v Robinson.[1] Nigerian authority, as provided by R v Ojukoko,[2] clearly supports the 'imminence' test. In strict principle - and accepting the premise underlying the sub judice rule, that prejudicial publicity may jeopardise fair trial, - there is clearly much to be said for the 'imminence' criterion. Moreover, the alternate tests (under either the common law or the new Contempt of Court Act) are instrinsically arbitrary - as graphically demonstrated by the facts of James v Robinson.[3] However, given the difficulties attendant upon the 'imminence' test, coupled with the paramount concern that freedom of the media should not be unduly restricted, the 'pending' test of common law - as further clarified by the Contempt of Court Act 1981 - has considerable practical advantage. Accordingly, should the point arise for decision in Nigeria again, it is submitted that it should - at minimum[4] - follow the lead provided by the Contempt of Court Act in this regard, rather than the authority of R v Ojukoko.[5]

9.8.2. The commencement of the sub judice rule in civil proceedings.

The difficulty of determining the appropriate commencement point for the operation of the sub judice rule in relation to civil proceedings

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1. (1963) 109 C.L.R. 593.
2. (1926) 7 N.L.R. 60.
3. (1963) 109 C.L.R. 593, described above.
4. It is submitted that considerable additional reform of the law is required, as further discussed in due course.
5. Supra.

is equally acute. The scale of the problem is graphically demonstrated by Attorney-General v Times Newspapers Ltd.,[1] in which - it may be recalled - the sub judice rule had been in operation for some ten years at the point when the Sunday Times began its series: with little prospect, moreover, of the matter ever coming to court at all.[2] The problems in relation to civil litigation are thus exacerbated by the slow pace of proceedings; and are compounded by the possibility of a writ being aimed at 'gagging' the media rather than seeking redress through the courts. Furthermore, the difficulties involved in the 'pending' and 'imminence' tests are equally - if not more[3] - severe.

9.8.2.1. The 'pending' principle.

It is clear[4] that the sub judice restriction on publication begins to operate as soon as civil proceedings are 'pending' - which means as soon as a writ is issued or some other formal step (such as the presentation of a petition for winding up) is taken.[5] It is also clear[6] that civil proceedings are not 'pending' prior to such formal step. Both principles are illustrated by the case of Re Crown Bank,[7] where a series of articles was published in the Star newspaper before the presentation of a petition for the winding up of the bank; and one further article followed soon after the presentation of such petition. The

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1. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

2. The reluctance of both sides to bring the matter to trial has previously been described, at p. 780.

3. This is because of the greater uncertainty as to when civil proceedings are about to begin, as further explained below.

4. Miller, op.cit., 85; Borrie & Lowe, op.cit., p. 148.

5. Ibid., particularly Miller.

6. Ibid., particularly Miller.

7. (1890) 44 Ch. D. 649.

latter article was held contemptuous, whilst the former series attracted no such liability: the court's approach being summarised in the following dictum of North, J.:

> 'So far, however, as the earlier paragraphs published before the petition was presented are concerned, their publication might be the subject of an action for libel, but could be no contempt of Court'.
> [1]

9.8.2.2. The test of 'imminence' and the difficulties in its application

As in the context of criminal proceedings, there is now considerable controversy as to whether the sub judice rule in civil proceedings may indeed begin to bite at an earlier stage - when proceedings are merely 'imminent'.

In principle, there seems no reason why the same rule should not apply to civil as to criminal proceedings. The underlying rationale for the restriction is the need to avoid potential prejudice to fair trial; and it is clear that the determination of the issues in civil proceedings may equally be prejudiced by publicity immediately before the issue of a writ as by publication immediately thereafter.

Authority, however, for the 'imminence' test in civil proceedings is far from clear in English common law. The Crown Bank[2] case, above, suggests that the sub judice restriction does not apply when civil proceedings are merely 'imminent'. So too does the decision in Re

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1. Ibid., at 651.

2. (1890), 44 Ch.D. 649.

Cornish, Staff v Gill:[1] but it must also be remembered that 'in each case, little consideration was given to the issue and [that, morevoer,] both cases were decided before the important case or R v Parke',[2] discussed above, in which Wills, J. emphasised that '[i]t is possible very effectually to poison the fountain of justice before it begins to flow'.[3] Moreover, in Attorney-General v Times Newspapers, Ltd.,[4] Lord Reid pointed out that: 'There is no magic in the issue of a writ or in a charge being made against an accused person. Comment on a case which is imminent may be as objectionable as comment after it has begun'.[5] In similar vein, Lord Diplock stated: 'To constitute a contempt of court that attracts the summary remedy, the conduct complained of must relate to some specific case in which litigation in a court of law is actually proceeding or is known to be imminent'.[6] It must also be acknowledged, however, that 'neither of the above [two] statements was made with the present point directly in mind':[7] though Miller nevertheless submits that 'both may come to be regarded as persuasive authority if the problem is squarely posed in a future case'.[8]

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1. (1892), 9 T.L.R. 196.
2. [1903] 2 K.B. 432.
3. Borrie & Lowe, op.cit., p. 148.
4. [1974] A.C. 273 (H.L.(E.)).
5. Ibid., at 301.
6. Ibid., at 308, emphasised supplied.
7. Miller, op.cit., p. 86.
8. Ibid.

Assuming the 'imminence' test does come to be accepted, the meaning of 'imminent' must be defined: and this poses problems even more acute than in the context of criminal proceedings. As Miller points out, '[i]n the latter case, the police may intimate that an early arrest is expected, whereas in [civil proceedings] there may be no warning that a writ is to be issued or an equivalent step taken'.[1]

The interests of certainty may therefore demand that the sub judice rule should come into operation only on the taking of some formal step, such as the issue of a writ. But then the further problem arises as to whether the completion of so simple a formality (requiring little time and only a nominal fee[2]) should be allowed to have the effect of stifling all further comment in the media on the basis that civil proceedings are now 'pending' - even though it may, in fact, be years[3] before the matter comes to trial. This problem has been identified as that of the 'gagging writ': and the appropriate response of the law to this difficulty remains controversial and subject to considerable conflicting authority.

9.8.2.3. The problem of the 'gagging' writ.

The problem is, in fact, only one of the many difficulties facing the media in embarking on 'investigative' journalism. A newspaper may have spent considerable time and effort investigating a scandal of legitimate public concern: from Watergate-type activities to suspected

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1. Miller, op.cit., p. 86.

2. It is also, of course, essential that it should remain simple and cheap to secure the issue of a writ - or the general public will be deterred to an even greater extent than at present (through the cost of proceedings) from turning to the courts for redress.

3. See Miller, ibid., p. 145; and see again the facts of the 'thalidomide' case, discussed above.

police corruption; from fraudulent dealing in 'antiques' to the 'fixing' of racing results. When it comes to publishing its findings, however, the newspaper will be faced with a number of legal hurdles: including the possibility of proceedings for defamation being instituted against it; and the risk that the police are concurrently investigating the same activity so that publication may give rise to contempt in the light of 'imminent' criminal proceedings. As Miller points out, '[a] further and even more immediate problem will arise if the newspaper publishes one of a series of projected articles and this is followed by the issue of a writ for libel'.[1] The plaintiff in such proceedings may be a rogue, taking calculated advantage of the sub judice rule to curtail further exposure of his activities - and may have no genuine intention of ever bringing the matter to trial in open court. Alternatively, he may legitimately be aggrieved: and may require the protection of the law of contempt to ensure that there is no prejudice to the fair hearing of his claim for defamation. The attempt to distinguish one situation from the other and to reconcile the conflicting interests involved - described by Phillimore, J. as: 'the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried'[2] - poses complex challenges to legal principle.

There are considerable judical dicta to the effect that a 'gagging writ' will not be allowed to stifle further publication: but there is still no authoritative pronouncement on the question. The strongest such dictum is probably that of Salmon, L.J., in Thomson v Times

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1. Miller, ibid.

2. This was in the case of Blumenfeld, ex parte Tupper, (1912), 28 T.L.R. 308 discussed by Miller, op.cit., p. 147.

Newspapers Ltd.,[1] as follows:

> 'It is a widely held fallacy that the issue of a writ automatically stifles further comment. There is no authority that I know of to support the view that further comment would amount to contempt of court. Once a newspaper has justified, and there is some prima facie support for the justification, the plaintiff cannot obtain an interlocutory injunction to restrain the defendants from repeating the matters complained of.[2] In these circumstances it is obviously wrong to suppose that they could be committing a contempt by doing so. It seems to me equally obvious that no other newspaper that repeats the same sort of criticism is committing a contempt of court'.[3]

He also qualified these remarks, however, by emphasising that he was not 'expressing any final view, because the point [was] not before th[e] court for decision'.[4]

Salmon, L.J.'s obiter dictum is, however, further buttressed by observations made by Lord Denning, J.R., in Wallersteiner v Moir[5] to the effect that it is 'a complete misconception'[6] to suppose that the issue of a writ puts a stop to discussion in the press or in public. Warming to this theme, Lord Denning emphasised that discussion cannot be stopped by the 'magic words' or 'abracadabra' of sub judice. He

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1. [1969] 3 All E.R. 648 at 651.

2. See Miller, supra, pp. 145-146, citing the authority of Bonnard v Perryman, [1891] 2 Ch. 269 and Fraser v Evans [1969] 1 Q.B. 349.

3. See the doubts as to the correctness of this contention expressed by Borrie & Lowe, op.cit., p. 94.

4. Thomson v Times Newspapers Ltd., supra, at 651.

5. [1974] 3 All E.R. 217.

6. Ibid., at 231..

stressed that '[f]air comment does not prejudice a fair trial' and concluded: 'The law says - and says emphatically - that the issue of a writ is not to be used as a muzzle to prevent discussion.... Matters of public interest should be, and are, open to discussion, notwithstanding the issue of a writ'.[1]

Unfortunately, however, the force of this statement of principle is diluted to some extent by the following passage in Lord Denning's judgment in which - turning to the facts of the particular case (that Dr Wallersteiner had attempted to prevent discussion of company affairs at company meetings by invoking the sub judice rule) - the Master of the Rolls pointed out that discussion of company concerns by shareholders could not, in any event, prejudice court proceedings: for the simple reason that neither judge nor jury were likely to read - or remember - reports of such discussions.[2] Lord Denning's earlier comments on the effect of 'gagging writs' in general must therefore be viewed as obiter dicta.

A further important statement of the relevant principle is to be found in the case of R v Blumenfeld, ex parte Tupper[3] in which Phillimore, J. pointed out:

> '... [T]o say that a newspaper was to be restrained from expressing its opinion on a man who bulked large in the public eye, from the issue of the writ to the trial of the action, the date of which must be to a considerable extent rest in the plaintiff's hands, would be a very grave restriction of the freedom of the Press,

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1. Ibid.

2. Ibid., at 232. This is perhaps an oversimplification of Lord Denning's observations but it is submitted that it encapsulates their core.

3. (1912), 28 T.L.R. 308.

> likely in many cases to be fraught with danger'.[1]

Phillimore, J. also recognised, however, the potential prejudice to fair trial in comments published shortly before the matter came to court; and stated that publications made 'on the eve of the trial' would be subject to the laws of contempt.[2] The reason for this is two-fold.

(i) memory of such publications is likely to be fresh at the time of trial and may therefore be prejudicial;

(ii) 'once the date of trial is fixed the genuineness of the writ [can] no longer be in doubt'.[3]

Assuming that the principle has indeed become established that 'a gagging writ ought to have no effect' - as stated by Lord Reid in Attorney-General v Times Newspapers Ltd.[4] - the practical difficulty remains of determining whether a particular writ is genuine or has been issued for ulterior motives. If there has been considerable delay in the propagation of proceedings, as in Fox, ex parte Mosley[5] (where three years had elapsed since delivery of the defendants' plea without any further steps being taken by the plaintiff to bring the matter to trial[6]) it is comparatively easy to conclude that the institution of proceedings is simply a device to stifle further comment. But, as Miller

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1. Ibid., at 311.
2. See Borrie & Lowe, op.cit., p. 93.
3. Ibid., p. 92.
4. [1974] A.C. 273 (H.L.(E.)), at 301.
5. The Times, 17 February 1966.
6. See Miller, op.cit., pp. 147-148.

points out, 'the fact remains that there is no way in which a newspaper or television company can identify a 'gagging writ' in advance'.[1] Further difficulties are, firstly, that only the defendants in the proceedings can apply to have them dismissed for want of prosecution - so that other media that may wish to comment must wait for them to do so; and, secondly, that although assurances against prosecution for contempt may be sought from the Attorney-General, this will not preclude 'the "rogue" himself from instituting contempt proceedings'.[2] Further difficulties have also been revealed by past proceedings, but examination of these lies outside the scope of this study.[3]

9.8.2.4. The recommendation of the Phillimore Committee

The Phillimore Committee attempted to deal with both the problem of the 'gagging' writ and the need for certainty in the law, by recommending that the sub judice rule should begin to operate from the time a case is set down for trial.[4] However, this test may still go further than necessary to protect fair trial, especially where (as in London and certainly also in Nigeria) there is often a considerable delay between this point in time and the commencement of proceedings in court. It is accordingly noteworthy that one member of the Committee[5] disagreed on this issue and recommended, instead, 'the establishment of a sub judice list of cases coming up for trial within one or two weeks'.[6] Lord Denning

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1. Ibid., p. 149, emphasis supplied.
2. Ibid.
3. For further detail of these, see Borrie & Lowe, supra, pp. 90-96.
4. The Phillimore Report, Cmnd 5794, paras 124-132, especially para 127.
5. This was Robin Day.
6. See the dissenting note, at pp. 98-100 of the Report, especially at para 7.

(who gave evidence to the Committee regarding the delay between set down and trial) himself recommended that the sub judice rule should begin to operate 'when the case comes into the term's list for hearing'.[1]

9.8.2.5. The commencement of the sub judice rule in civil proceedings under the new Act

The recommendations of the Phillimore Committee have again been given statutory force under the Contempt of Court Act 1981, which provides that the sub judice rule begins to operate (in the context of civil proceedings) 'from the time when arrangements for the hearing are made or, if no such arrangements are previously made, from the time the hearing begins'.[2]

9.8.2.6. The test to be applied in Nigeria

In Nigeria, authority as to the test to be applied is somewhat limited. In Re Onagoruwa,[3] the hearing was due to commence in two days' time, so that either the 'pending' test of common law or the statutory test now provided by the new United Kingdom legislation would - in the circumstances - have been met, Furthermore,the judgment - understandably - throws no light on whether the 'imminence' principle is recognised in Nigeria; nor does it advert to the problem of the 'gagging' writ.

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1. See para 3 of the dissenting note, supra.

2. s. 2(3) read with s 2(4) and para. 12, Schedule I, Contempt of Court Act. This effectively means when the case is set down for trial; or the date for hearing is fixed.

3. Suit No. FCA/E/117/79.

However, it is clear that the common law principles discussed above (with all their attendant difficulties) apply equally within Nigeria; and it is accordingly submitted that Nigeria should abandon the 'pending' principle of common law in favour ( not merely of the present United Kingdom statutory rule) but, rather, of the recommendation proposed by one member of the Phillimore Committee: that the sub judice rule should begin to operate only when a matter is due for hearing within the next week or fortnight.[1] A more wide-ranging restriction is not justified in the interests of fair trial - especially since jury trial does not apply at all in civil litigation in Nigeria - and imposes too great a restriction on media freedom.

### 9.8.3. Termination of the sub judice rule in criminal and civil proceedings.

Thus far, discussion has been confined to the appropriate commencement point for the sub judice restriction. Problems also surrounded the correct termination stage; and - although these are of considerably lesser magnitude - brief examination of these is now required. Again, for the sake of clarity and ease of reference, a distinction is drawn between criminal and civil proceedings: and each of these is discussed in turn.

#### 9.8. .1. Termination of the sub judice rule in criminal proceedings.

A criminal case remains sub judice during the period when it is open to the accused to appeal against conviction or sentence or, in the

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1. See p. 854.

event of an appeal being lodged, until it has been heard and determined.[1] Where a re-trial seems likely (because the jury has failed to agree upon a verdict[2]) or has been ordered on the basis of fresh evidence being available[3] or because of a mis-trial warranting a venire de novo,[4] the proceedings remain sub judice until such re-trial (including any appeal therefrom) has been finally determined. However, there appears less likelihood of contempt proceedings being either taken or succeeding in relation to publications after the initial verdict has been given but before any appeal has either been determined or become prescribed: for it is recognised that appeal judges are generally immune - in determining legal issues - from the adverse pressures of public opinion.[5]

verdict[2]

9.8.3.2. Termination of the sub judice rule in civil proceedings.

As regards civil proceedings, the same rules should, in principle, be equally applicable. There is, however, certain authority at common law to the effect that the sub judice restriction terminates as soon as judgment at first instance has been given - even though an appeal may still be lodged - but becomes operative again once notice of appeal

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1. See Miller, op.cit., p. 84; Borrie & Lowe, op.cit., p. 147; Halsbury's Laws, op cit, Vol. 9, para. 14.

2. This possibility is mentioned for the sake of completeness, but is unlikely to apply in Nigeria where trial by jury is extremely rare.

3. Miller, ibid.

4. Ibid.

5. Borrie & Lowe, ibid., p. 147. It is significant to note that in both of the two leading authorities for the continued operation of the sub judice rule pending appeal - Delbert-Evans v Davies and Watson [1945] 2 All E.R. 167 and Duffy, ex parte Nash [1960] 2 Q.B. 188 - the court's conclusion was that 'no contempt had been committed because the possibility of prejudice was remote or non-existent'. See Miller, supra. Hence, Borrie & Lowe's conclusion is that the "extension" of the sub judice rule recognised by these cases does not in practice impose additional restrictions on publication.

has been given. However, the cases[1] which indicate this were decided in the nineteenth century - 'well before the modern English authorities establishing that criminal proceedings remained sub judice at least during the period when it is open to an accused to appeal; [and] [t]here is no reason why a different rule should apply in civil proceedings'.[2] Accordingly, it is submitted by both Miller[3] and Borrie and Lowe[4] that civil proceedings remain sub judice until any appeal has finally been determined or until the time for lodging an appeal has expired. Likewise, the sub judice restriction remains in force where a re-trial appears likely, or has been ordered.[5]

9.8.3.3. The Phillimore Committee proposals and the Contempt of Court Act 1981.

The Phillimore Committee recommended that criminal proceedings should remain subject to the sub judice rule until 'the trial has been concluded and sentence passed'.[6] As regards civil proceedings, it proposed that restrictions should cease to apply once the hearing at first instance had been concluded.[7] Both proposals are reflected in the new Act.

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1. Metzler v Gonod (1874) 30 L.T. 264; Dallas v Ledger, (1888) 4 T.L.R. 432.
2. See Miller, supra, p. 86.
3. Ibid., p. 87.
4. See Borrie & Lowe, supra, p. 151.
5. See also Halsbury's Laws, op cit, para 22.
6. Miller, supra , p. 84, citing the Phillimore Report, Cmnd 5794, 1974. para. 132.
7. Ibid.

The rules provided by the Contempt of Court Act 1981 are somewhat complex. In brief outline, they provide that criminal proceedings cease to be 'active' (so as to be subject to the sub judice rule) when the proceedings are concluded (by aquittal, verdict, discontinuance or operation of law[1]); or when an accused is declared unfit to plead or to be tried;[2] or on the expiry of twelve months from the issue of a warrant unless s suspect has been arrested within that period.[3] Civil proceedings cease to be 'active' when the 'proceedings are disposed of or discontinued or withdrawn'.[4]

9.8.3.4. The test to be applied in Nigeria.

In Nigeria, the termination of the sub judice rule in both criminal and civil proceedings is still governed by the common law, with all the uncertainties described above. It is accordingly submitted that Nigerian law should follow the lead provided by the United Kingdom legislature in this regard. Accordingly, similar time-limits should be introduced: as these would not only have the merit of certainty; but would also serve to narrow the restriction on media freedom posed by the sub judice rule in its common law ambit.

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1. Para. 5 (a)(b) and (c), Schedule I, read with ss 2(3) and 2(4), Contempt of Court Act, 1981.

2. Para. 10, ibid.

3. Para. 11, ibid. This clearly represents an attempt to deal with the "Lord Lucan" type of situation in which a warrant is issued and the suspect then succeeds in eluding arrest for a considerable period.

4. Para. 12, ibid.

## 9.9. The Defences to Liability for Contempt Under the Sub Judice Rule.

Having thus examined the types of publication prohibited by the rule, the principles under which liability is determined, and the period during which restrictions apply, it now remains to consider the defences - if any - upon which an alleged contemnor may rely.

### 9.9.1. Failure to make out a prima facie case.

It is plain that if one of the essential ingredients for liability is not established, the alleged contemnor is entitled to discharge. Thus, if the comment is too general to amount to prejudgment (as in Akinrinsola v Attorney-General of Anambra State[1]); or the accused is not responsible for publication (as in McLeod v St. Aubyn[2] and, more arguably, in R v Ojukoko[3]); or if the sub judice rule has not yet come into operation (as might have been argued in R v Ojukoko[4]), then - clearly - the alleged contemnor is not even prima facie liable and must be acquitted.

### 9.9.2. Absence of intent to prejudice fair trial.

It is abundantly clear, from the discussion of the 'strict liability' principle above, that absence of intent to prejudice fair trial constitutes

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1. (1980) 2 N.C.R. 17.
2. [1899], A.C. 549 (P.C.) Here, the accused - who had lent his copy of a newspaper to the local library - was acquitted as he did not 'intend to publish'.
3. (1926) 7 N.L.R. 60. Here, the printers were discharged: on the basis that they had been joined in the proceedings only 'as a matter of form'.
4. Supra. Proceedings were not yet 'pending', as generally required under the common law.

no defence at common law. Thus, a publication based on honest mistake,[1] absence of knowledge that proceedings are pending[2] or genuine desire to serve the public interest[3] will constitute contempt if its objective effect is (potentially) to prejudice fair trial. Moreover, at common law, printers[4] and distributors[5] of such material are prima facie liable, and have no defence on which to rely.

In the United Kingdom, the harshness of the common law rule was highlighted by the decisions in Odhams Press, Ltd.[6] and the Griffiths[7] case. The Odhams judgment (in which publishers who had no reason to suspect that proceedings were already pending were convicted of contempt[8]) seemed more than unduly onerous - particularly in the absence of any central registry for the issue of writs or warrants; and it accordingly prompted the following observation from Glanville Williams:[9]

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1. See the Evening Standard case, [1954] 1 Q.B. 578.

2. See 'Odhams Press', [1957] 1 Q.B. 73 above.

3. See Littler v Thompson, (1839) 2 Beav. 129; 48 E.R. 1129, above; and Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 (H.L.(E.)).

4. See cases cited at p. 804 et seq.

5. See R v Griffiths, ex parte Attorney-General [1957] 2 Q.B. 192.

6. [1957]1 Q.B. 73.

7. Supra.

8. See p. 802.

9. Criminal Law: The General Part, 2nd ed., 1961, p 247, (cited by Lowe & Lowe, op.cit., p. 185).

> ''[T]he offence of contempt of court should [in Odham's case] have been renamed unavoidable inadvertence of court. [The] effect [of the case] was ... to make the displeasure of the judges as unavoidable and unpredictable as an Act of God'.
> [1]

The decision in Griffiths' case was also criticised as harsh in the extreme, for W.H. Smith and Co. (at the time of the decision) dealt in over 300 foreign publications at Victoria Station alone; so that an attempt to exercise greater control would have created great difficulty - and the obligation to do so (implicit in Griffiths' case) would have acted as a major disincentive against further foreign imports (even of magazines as reputable as Newsweek): with unfortunate consequences for freedom of expression in the United Kingdom.[2]

It was primarily to stem this tide of criticism that s 11 of the Administration of Justice Act, 1960 was introduced. This provision has now been repealed and replaced by s 3 of the Contempt of Court Act 1981 (which is in substantially similar terms) and provides:

> 's 3(1) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.
>
> (2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing

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1. Ibid.

2. See the report of Justice in 1959, entitled Contempt of Court to the effect, inter alia, that the Griffiths' decision 'imposes a real hardship on distributors of news, and a disincentive, contrary to the public interest, to the import into England and Wales of news and views, however reputable, from abroad'. (See p. 10).

any such matter if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.

(3) The burden of proof of any fact tending to establish a defence afforded by this section to any person lies upon that person'.[1]

Subsection (1) is clearly designed to cater for the Odhams Press type of case, and subsection (2) for the Griffiths' situation. As for subsection (3), it places a heavy burden of proof upon the accused; and it is submitted that it would have been far preferable if the legislation had made it clear that the onus rested on the prosecution to prove the relevant knowledge under either (1) or (2), as an essential element in liability. Although, as commentators have pointed out, the standard of proof required of the accused is no more than proof 'on a balance of probabilities',[2] this is cold comfort: and can do little - in practice - to alleviate the burden.

The legislation is open to criticism in other ways as well, and it is doubtful whether it goes far enough in providing protection against the rigours of 'strict liability'. The scope of the defences provided by s 3 is extremely limited; and neither would avail the accused in a situation similar to that in Evening Standard[3] case (where an erroneous report of court proceedings was published through a reporter's honest

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1. s 3, Contempt of Court Act, 1981.

2. See Miller, op.cit., p. 165 and Borrie & Lowe, op.cit., p. 187.

3. R v Evening Standard Co. Ltd., ex parte Attorney-General, [1954], 1 Q.B. 578.

mistake); or in the Thomson Newspapers Ltd.,[1] type of situation (where the editor of the Sunday Times fully appreciated that proceedings against Malik were in progress, but did not realise that the article in question contained prejudicial material[2]). Furthermore, the value of the defences in practical terms depends upon the strictness with which the test of 'reasonable care' is applied. As pointed out by Glanville Williams, if this test demands that a newspaper editor must 'make diligent search and enquiry to find whether ... proceedings have been started or are imminent'[3] - a difficult task given the absence of any central register for the issue of warrants, noting of committals and so forth - and that a distributor of foreign publications 'is still under a duty to scan them for obnoxious matter',[4] then the legislation does little to cure the mischief in the law. Certainly, it seems that s 3 would not have availed Odhams Press[5] in the particular circumstances, where proceedings had already progressed to the committal stage, and it would have been extremely difficult to prove the exercise of reasonable care. It is also uncertain whether the sub-section would have assisted David Frost, assuming he had been charged with contempt (following the Savundra interview on television[6]) even though it appeared that he had been informed

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1. Thomson Newspapers Ltd., ex parte Attorney-General. [1968] 1 W.L.R. 1.

2. The article described Malik (charged with an offence under the Race Relation Act, 1965) as a 'brothel keeper, procurer and property racketeer. It was considered a 'serious' contempt, because 'a jury is not entitled to know anything of [a] prisoner's bad character, if he has a bad character'. (Ibid., at 4). It appeared that the editor had no idea of 'the highly derogatory remarks' included in the article by the journalist who had prepared it; and who, apparently, had overlooked the risk that the words might be prejudicial to Malik's trial (of which both he, and the editor, were fully aware). The editor was not punished, therefore but the proprietors of the newspaper were nevertheless fined £5,000.

3. Op.cit., p. 250.

4. Ibid.

5. See p. 802.

6. See p. 835.

by the Board of Trade and the Fraud Squad (whom he had contacted before the interview) that proceedings were not then contemplated.[1] It is submitted that such degree of care as displayed by David Frost ought to be acknowledged as sufficient to satisfy the test laid down by the legislature.

Deficient in many respects as this provision accordingly is, it nevertheless represents a considerable advance over the common law rule. It is therefore most disturbing that, in Nigeria, no such reform of the law has yet been effected. Instead, the 'strict liability' principle continues to apply in its full rigour; and the dangers this poses to media freedom are considerable. It is accordingly submitted that Nigeria would be well advised to follow the United Kingdom example in introducing similar amending legislation. However, the statutory provision thus introduced should make it clear that the onus lies on the state - in keeping with general principles of criminal liability - to prove the relevant knowledge or lack of reasonable care on the part of the accused. Furthermore, the test of what is 'reasonable' should not be set inordinately high.

This reform is suggested as a minimum measure: for it is also submitted that the strict liability rule should be abolished altogether - in which event these defences would clearly become largely unnecessary. This more radical solution is examined further below; and - for present purposes - may it accordingly suffice to emphasise that <u>something</u> must be done (as has already been achieved in certain parts of Nigeria as regards the tort of defamation[2]) to ameliorate the position of the "innocent" publisher and "innocent" distributor.

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1. This was maintained by David Frost in a letter to <u>The Times</u> - see <u>The Times</u>, 18 July 1968.

2. See the section on the Law of Civil Defamation, at p. 516 and p. 524. The defence of 'innocent publication' applies only within the southern states, as previously explained in Chapter Six.

In the United Kingdom, the Phillimore Committee considered the possibility of abolishing the strict liability rule, but ultimately decided against this. Its reasons were, briefly, as follows:

> 'A liability which rested only on proof of intent or actual foresight would favour the reckless at the expense of the careful. [Moreover], [m]ost publishing is a commercial enterprise undertaken for profit, and the power of the printed or broadcast word is such that the administration of justice would not be adequately protected without a rule which requires great care to be taken to ensure that offending material is not published'.[1]

There is clearly certain force in these considerations; but it is open to considerable question whether the problem is as acute as the Committee apparently believed. The Committee's view is heavily premised on the dangers of trial - in the face of a barrage of sensational and highly prejudicial media publicity - by a panel of untrained and inexperienced jurors. However, the same risks do not arise where trial is conducted by judicial officers alone (as is the norm in Nigeria), whose training and experience fits them to focus only on legally admissible evidence. In such circumstances, there accordingly seems no adequate reason for departing from the fundamental principle of criminal law that actus reus must be accompanied by mens rea to give rise to liability. Furthermore, it should also be remembered that freedom of expression in Nigeria is guaranteed by the Constitution; and it is doubtful (as further explained in due course) whether the imposition of strict liability is consistent with this fundamental right.

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1. The Phillimore Report, Cmnd 5794, 1974, para. 74.

If this suggestion seems too radical, however, then consideration must - at least - be given to the need for some more general defence, to cater for the type of situation which arose in Attorney General v Times Newspapers Ltd.,[1] and in relation to which none of the defences described above (as presently recognised in law[2]) would, in principle,[3] have availed the accused.

### 9.9.3. The defence of overriding public interest in full discussion

In Attorney-General v Times Newspapers Ltd.,[4] the defendants forcefully contended that there was, in the particular circumstances of the thalidomide tragedy, an overriding public interest in full discussion of the issues raised by the children's plight and that this should be recognised as exonerating them from any liability for contempt. In the Divisional Court and House of Lords, the contention was swiftly rejected; whilst the Court of Appeal and European Court of Human Rights took a very different view. These conflicting judicial viewpoints accordingly merit some examination.

#### 9.9.3.1. Rejection of a 'public interest' defence.

In Attorney-General v Times Newspapers Ltd.,[5] the Divisional Court

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1. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

2. If the defence of absence of mens rea were to be accepted, as advocated above, the matter would, of course, assume a different complexion.

3. On the facts of the case, it is arguable that the draft article neither prejudged the issues, nor brought undue pressure to bear on Distillers, as indeed held by the European Court of Justice (contrary to the view of the House of Lords).

4. [1973] 1 Q.B. 710; [1974] A.C. 273 (H.L.(E.)).

5. [1973] 1.Q.B. 710.

was quick to reject the defence contention that, in the circumstances, the 'right of the public to be informed on the grave and weighty issues of the day'[1] outweighed the public interest against potential interference in proceedings. The court emphasised that 'English authorities ... do not require the court to balance competing interests,[2] but [do] require that a comment which raises a serious risk of interference with legal proceedings should be withheld until those proceedings are determined'.[3]

This viewpoint was echoed in the House of Lords by Lord Simon of Glaisdale, who stressed that 'the paramount interest pendente lite is that the legal proceedings should progress without interference'.[4] Hence - during this period - no defence of public interest could prevail.

Other of the Law Lords were prepared to give a somewhat freer rein to the defence of public interest, but nevertheless emphasised that it must be kept within firm bounds. Thus, three of their Lordships took pains to stress that discussion of a general nature regarding questions of wide public interest is not to be restrained simply because it raises factors which form the background to pending litigation.[5]

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1. [1973] 1 Q.B. 710 at 725.

2. In this regard, the Divisional Court appears to have gone even further than the House of Lords, which recognised that the competing interests in full discussion of important issues and in the proper administration of justice were called into play by the proceedings; and had to be balanced against each other in order to reach a solution.

3. Supra, at 726.

4. Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 at 320.

5. Ibid., per Lord Morris, at 306; Lord Diplock at 313; and Lord Cross at 323-324.

Accordingly, to cite the judgment of Lord Morris of Borth-y-Gest, the Sunday Times could quite lawfully have reviewed the principles for assessment of damages, the delays endemic in the judicial process and the need for strict liability to be imposed on drug manufacturers and distributors; and could also have called attention to the plight of the thalidomide children and launched a 'temperate and reasoned appeal'[1] to Distillers to acknowledge a greater degree of moral responsibility. In addition, the Lords emphasised that, where discussion of a matter of general interest is already in progress when proceedings commence, further discussion is not to be inhibited merely because it carries an incidental and unintended risk that the particular proceedings may be affected thereby.[2] Neither principle served to exonerate the Sunday Times in the particular circumstances, however, as the draft article went beyond general discussion to prejudgment of specific issues;[3] and was also deliberately intended to put pressure on Distillers.[4]

9.9.3.2. The defence of 'public interest' supported

It is interesting to note that a different view of the importance of 'public interest', under common law, was taken by the Court of Appeal in the 'thalidomide' case. Here, Lord Denning M.R. emphasised that '[t]here may be cases where the subject matter is such that the public interest [in discussion of questions of national concern]

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1. Ibid., at 307.

2. See ibid, at 294-295, per Lord Reid, and at 321, per Lord Simon.

3. See p. 783 - 784.

4. The intention of the editor of the newspaper to put pressure on Distiller's was frankly acknowledged in his affidavit, described at p. 787 above. See also the discussion of the 'pressure' principle above.

counterbalances the private interests of the parties [in fair trial]'; and that '[i]n such cases, the public interest prevails [and] [f]air comment is to be allowed'.[1] In addition, Scarman, L.J. pointed out that the issue of the writs was 'only a minor feature in a situation which deeply disturb[ed] the nation, and in which the public ha[d] a very great interest in freedom of discussion'.[2]

The European Court of Human Rights stressed the importance of freedom of expression as 'one of the essential foundations of a democratic society';[3] and pointed out that 'the courts cannot operate in a vacuum',[4] divorced from social reality and the pressing problems of the times. Furthermore, whilst the courts are clearly the appropriate fora for the settlement of disputes, 'this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large'.[5]

The European Court also emphasised the importance of the media, and declared that 'it is incumbent upon [them] to impart information and ideas concerning matters that come before the courts just as in other areas of public interest'.[6] It pointed out that 'the public ... has a [corresponding] right to receive'[7] such information, particularly

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1. Attorney-General v Times Newspapers Ltd., [1973] 1 Q.B. 710 at 739.
2. Ibid., at 746.
3. Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245, at para. 64.
4. Ibid.
5. Ibid.
6. Ibid.
7. Ibid.

when the matter in question raises 'fundamental issues concerning protection against and compensation for injuries resulting from scientific developments'.[1] Moreover, it was artificial (as the House of Lords had attempted) to separate discussion of 'wider issues' from the question of Distillers' negligence, for '[t]he question where responsibility for a tragedy of this kind actually lies [was] also a matter of public interest'.[2]

9.9.3.3. The present status of 'public interest' at common law.

Persuasive as is the reasoning of the European Court on the importance of uninhibited discussion of matters of vital public concern, it must be remembered that the judgment of the European Court is not an authoritative pronouncement of the common law. As the Court itself emphasised, its function was not to balance the competing interests recognised by the common law, (freedom of discussion vis-a-vis the proper administration of justice), but rather to determine whether the United Kingdom was in breach of her obligations under Article 10 of the European Convention. This task accordingly required the interpretation of 'a principle of freedom of expression that is subject to a number of exceptions which must be narrowly construed';[3] and which could only be justified if they corresponded to a 'pressing social need'.[4] The judgment - though an important authority on the meaning of Article 10 of the European Convention - is thus (in the context of

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1. Ibid., para. 66.

2. Ibid.

3. Ibid., para. 64.

4. Ibid., para. 59.

the common law) no more than persuasive.

The authoritative pronouncement of common law is accordingly that contained in the judgment of the House of Lords. This has considerable significance for the unwritten law of contempt in Nigeria, especially in the light of the widely accepted view that House of Lords' decisions on common law are still binding on Nigerian courts.[1] The Nigerian guarantee of freedom of expression may, of course, provide a basis for rejecting the authority of the Lords in this regard: and this possibility is further discussed in due course.[2] Suffice it therefore, for the present, to note that at common law (as interpreted in Attorney-General v Times Newspapers Ltd.[3]), public interest in discussion of matters which form the background to pending proceedings takes second place to the protection of the proper administration of justice. Only at the conclusion of the proceedings does the balance shift, so as to give the public interest in full discussion overriding priority.[4] Two exceptions to this general rule are recognised: but these allow no more than discussion confined to general comment, or the continuation of debate already in progress (subject - in the latter case - to the proviso that any resultant risk of prejudice to fair trial must be no more than an incidental and unintended by-product of the continued debate[5].

9.9.3.4. The need for reform of the common law in this regard.

The need for reform of the common law in this respect - following the

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1. See the section on the Sources of Nigerian Law, at p. 161 et seq.
2. See p. 892 et seq.
3. [1974] A.C. 273 (H.L.(E.)).
4. See ibid., at 319, per Lord Simon, as discussed above.
5. See ibid., at 295, per Lord Reid, and 321, per Lord Simon, discussed further at p. 873, where the authority relied on by their Lordships - Ex parte Bread Manufacturers Ltd - is further examined.

Lords' decision in the 'thalidomide' case - was examined in the United Kingdom by the Phillimore Committee on Contempt.[1] Unfortunately, however, the Committee rejected the need for the introduction of a general defence based upon overriding public interest in disclosure. The Committee 'recognised that in particular cases it could be argued that [the] public interest in publication outweighed that in ensuring a fair trial'.[2] Nevertheless, the Committee rejected the proposed defence on the basis that it would introduce too great an element of uncertainty into the law. All that the Committee was prepared to concede was that an existing public debate should not necessarily be halted by the inception of proceedings and that 'discussion might continue even if it might as an incidental but not intended by-product cause a risk of prejudice to a person who happen[ed] to be a litigant at the time'.[3]

This exception is, of course, derived from the judgment of the House of Lords in the 'thalidomide' case[4] and is, in turn, taken from the Australian case of Ex parte Bread Manufacturers, Ltd.,[5] where a New South Wales court held that 'newspaper criticism of a company's activities in fixing the price of bread might legitimately continue notwithstanding an intervening libel and conspiracy action brought by a third party against the company'.[6] The logic underlying this concession is, as Miller points out, difficult to comprehend: for there seems no good reason' 'why interference with the administration of justice [should] be more or less justifiable according to whether it [is] prompted by

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1. The Phillimore Report, Cmnd 5794, 1974, para. 145.
2. Arlidge & Eady, op.cit., p. 94.
3. Ibid. See also the Phillimore Report, supra, para 142.
4. Per Lord Reid at 297 and per Lord Simon at 321.
5. (1937)37 S.R.(N.S.W.) 242 at 249 especially.
6. Miller, op.cit., p. 152.

a particular event which later gave rise to proceedings, or whether it had already begun at a general level before the occurrence of that event'.[1] It would accordingly have made more sense (and resulted in fairer law overall) if both the House - and, hence, the Phillimore Committee - had relied instead on the more general principle enunciated by the New South Wales court of which this particular rule is only a part. The broader statement proceeded as follows:

> 'But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations'.[2]

Thus dictum clearly acknowledges the absurdity of limiting legitimate discussion to that which - fortuitously - has preceded the inception of proceedings. It is submitted that there is sound sense in this view: and that it is therefore greatly to be preferred to the Phillimore Committee proposals.

A further difficulty in the Committee's recommendation lies in the fact that it restricts further discussion to that which has an incidental and unintended side-effect of prejudicing pending proceedings. It accordingly fails entirely to provide for the kind of situation in issue in the 'thalidomide' case: where the editor deliberately set out to influence Distillers and to induce the company to offer a more generous settlement

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1. Ibid.

2. Ex parte Bread Manufacturers, Ltd., supra, at 249.

to the victims of the drug.[1] Yet the editor was convinced that he was doing no moral wrong thereby:[2] that, on the contrary, his moral responsibility lay in trying to assist the children to the maximum extent. Should it not, therefore, be recognised that, in appropriate circumstances - such as those pertaining in the thalidomide case - there is indeed an overriding public interest in full discussion: and, indeed, even in the exertion of pressure to do the "right" thing, albeit this is not required by the strict letter of the law?

In this regard, it is worth speculating as to what the probable consequences of allowing full discussion of the 'thalidomide' case would have been.

If the Sunday Times had been permitted to publish its draft article, as planned, this may perhaps have led to widespread public indignation against Distillers.[3] It is unlikely, however, to have affected the outcome of the proceedings in actual trial. The legal obstacles to the children's claims, as discussed above,[4] were considerable; and no judge could have ignored these because of general public sentiment that Distillers should be held liable. The medical and scientific experts whose testimony would have dominated the proceedings would have been governed, in giving their evidence, not by media reports, but by their own sense of professional competence and integrity. Hence, the outcome of any trial - notwithstanding the pressure exerted by the media and the force of public opinion - would most likely have been that the

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1. See the discussion of the editor's intention above, and in the note below.

2. In para. 26 of his affidavit, Mr Evans stated: 'I admit that my purpose in seeking to publish the draft article is to try to persuade Distillers to take a fresh look at their moral responsibilities, but I submit that this persuasion is in no way improper'.See Attorney-General v Times Newspapers Ltd., (D.C.) [1973] 1 Q.B. 710 at 721.

3. It is by no means certain that the draft article would have produced this effect for it was well balanced in its presentation and concluded

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the company was not liable in damages to the thalidomide victims. This conclusion may well have sparked a public outcry: but this would have been directed - not against the judge or judges who applied the law and come to the decision it demanded - but against the law itself. Accordingly, this would not have brought the administration of justice into disrespect in any meaningful sense. The result might well have been public demand for a change in the law - possibly in the direction of imposing strict liability on drug manufacturers or distributors, or of introducing a system of compulsory insurance to ensure adequate payment of compensation to future victims of similar misfortune. But would this have been undesirable?

The result may be said to be "trial by newspaper" and "law amendment through the media", but what do these emotive phrases really signify? Full reporting is likely to enhance public understanding of the complexities of both the judicial and the legislative process; and it must also be remembered, as emphasised by Lord Cross in the House of Lords, that the public has a vital interest in hearing 'unhampered debate on whether the law, procedure and institutions which it ha[s] ordained have operated satisfactorily or call for modification'.[1]

The inhibiting effect of the present rule on investigative journalism must also be acknowledged. The media have played a vital role in the past in exposing government corruption or inefficiency, and in bringing

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Continued:
by emphasising that there is no 'neat set' of answers.

4. See p. 780.

1. Attorney-General v Times Newspapers Ltd., [1974] A.C. 273 at 320.

fraudulent business practices to light - to name but a few examples. This investigative role should be encouraged: not hindered by the rules of contempt. Moreover, as Miller points out, 'discussion of matters of genuine international concern, such as Watergate or the massacre at My Lai cannot sensibly be required to be suspended once a libel action [or other proceeding] has been [instituted]'[1].

It is submitted, moreover, that the problem of uncertainty is not so great a difficulty as the Phillimore Committee considered it to be. In this regard, it is worth noting the recent submission of the Law Commission in the context of breach of confidence: for the points made by the Commission regarding the application of a general defence of public interest may be applied mutatis mutandis to the law of contempt. The Law Commission stated:

> 'The public interest is a developing concept which changes with the social attitudes of the times: many things are regarded as being in the public interest today which would not have been so regarded in the last century, or even twenty years ago.... If this fact is recognised, it seems to us that the only prudent course to follow is to frame the defence in terms which are flexible enough to enable each case to be judged on its own merits'.
> [2]

If the courts can be entrusted with the delicate task of balancing competing interests within this sphere of the law, there seems no reason why they should not equally be given such discretion in relation to

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1. Miller, op cit, pp 153-154.
Miller also suggests other (more prosaic) examples which are, however, equally important. Thus the public interest in allowing a newspaper to publish a photograph of a dangerous criminal on the run (without risking conviction for contempt) should be acknowledged. So too should the public interest in exposure by the media of "crooks" out to make a quick buck at public expense. Thus, Miller quotes the example of the Sunday Times which, 'in August 1969, ... reported that a certain Raymond Groome who was promising a high rate of return from a £100 company ... had recently been sentenced to two years' imprisonment on charges of fraud'. See,generally, Miller, p 153.

2. Law Commission, Breach of Confidence, Working Paper No 58, 1974, para 93.

contempt. Much will, of course, depend on particular circumstances; and there will inevitably be grey areas in which it is extremely difficult to prefer one interest above another. Yet this is a difficulty which faces the law in a number of spheres - which may even be considered endemic in the attempt to regulate the conflicting forces within society through legal principle. And it should not be allowed to obscure the fact that there will also be a great number of instances in which - providing the courts remain in touch with the pulse of modern society - it will be relatively easy to predict where the overriding public interest lies. The thalidomide case, itself, clearly illustrates this point.

9.9.3.5. The limited 'public interest' "defence" in the Contempt of Court Act 1981.

The recommendations of the Phillimore Committee have been implemented in the United Kingdom in the limited "defence" of 'public interest' now provided by the Contempt of Court Act 1981. Thus, s 5 states:

> 'A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion'.[1]

The ambit and meaning of this provision have already been examined by the House of Lords in Attorney-General v English,[2] in which (it may be recalled) a newspaper article published on the third day of the trial of an eminent paediatrician consultant for the murder of a

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1. s 5, Contempt of Court Act 1981.

2. [1982] 3 W.L.R. 278, (H.L.(E.)).

mongoloid baby was found to create 'a substantial risk of serious prejudice' to the proceedings because of its assertion that 'it was a common practice among paediatricians to let severely ... handicapped new born babies die'.[1] The question which then arose was whether the article constituted a contempt, in the light of s 5 above.

The Divisional Court ruled that it did, as the above assertion was 'unnecessary' to the main theme of the article (which was to support the candidacy of one Mrs Carr, standing in a Parliamentary by-election on an independent 'pro-life' platform[2]); and amounted to personal 'accusation', which could not be taken as 'merely incidental' to general discussion, within the meaning of s 5.

On appeal, the House of Lords disagreed, however. It stressed its disapproval of the test applied by the lower court; and emphasised that the appropriate criterion is 'whether the risk [of prejudice] created ... is no more than an incidental consequence of expounding [the] main theme [of the discussion].[3] The article dealt with two questions of clear public concern: Mrs Carr's candidature as a pro-life candidate, and the wider issue of the moral justification of mercy killing - especially of newly born, handicapped babies.[4] It was a central plank in Mrs Carr's platform that the killing of such babies was wide-spread and ought to be stopped; and, hence, 'an article supporting [her] candidature ... that contained no such assertion would depict her as tilting at imaginary windmills'.[5] The article accordingly satisfied

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1. Ibid., at 297, per Lord Diplock.
2. See p. 772 above, where the facts of the case are more fully described.
3. Attorney-General v English, supra, at 287.
4. Ibid.
5. Ibid.

the test propounded by the Lords, and did not constitute contempt.

The new provision, as amply demonstrated by this decision, goes some distance towards remedying the present deficiency in the common law. It is particularly important in that - according to the House of Lords - it throws the burden upon the state to show that the publication in question falls outside the ambit of the section, failing which it is not to be considered a contempt.[1] Accordingly, the new provision is not strictly a defence (which the alleged contemnor would have to substantiate) but is rather an essential factor in determining prima facie liability in the first instance. Notwithstanding these positive features, however, the new provision also has a number of limitations. Thus as Lowe[2] points out:

> 'Great care should be taken in interpreting s 5. It does not in the name of public interest give a carte blanche to discuss the particular facts of "active" proceedings. That would be to confuse it with the defence of "public interest" which Phillimore did not recommend and which is not in the Act. In fact s 5 may be considered no more than a statutory formulation of the defence accepted in the thalidomide case that discussions of public affairs cannot be stifled by supervening litigation.... Whether s 5 also covers discussion of issues raised by "active" proceedings is more debatable (would the risk of prejudice be merely "incidental"?).'[3]

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1. See ibid., at 286. The House of Lords thus disagreed with the Divisional Court on the issue of onus as well; and pointed out that the section stands on an equal footing with s. 2(2) and likewise states what publications shall not amount to contempt (despite their tendency to interfere with the course of justice in particular legal proceedings).

2. N.V. Lowe: 'The Contempt of Court Act 1981: The Strict Liability Rule', (1981) 131 New Law Journal, pp. 1167-1170.

3. Ibid., at 1169.

A further difficulty inherent in the wording of s 5 is the requirement of 'good faith'. As pointed out by Lowe, the statute provides no indication as to whether the test is objective or subjective;[1] and '[t]he great fear is that the defence will [accordingly] hang on the whim and caprice of the judge trying the case'.[2] Again, no guidance on this point is to be gleaned from the proceedings in Attorney-General v English, for it was not disputed by the Attorney-General that the article had been published otherwise than in good faith;[3] and all that was said in this regard (by the Divisional Court) was that this was 'an issue which undoubtedly in some circumstances could be of vital importance'.[4] It is submitted that the test must be acknowledged as subjective: for otherwise the provision will lose much of its force and practical importance.

Moreover, there is a further limitation to the ambit of the section, as emphasised by the House of Lords in Attorney-General v English.[5] Their Lordships stressed that the article in question was the very 'antithesis' of that in issue in the 'thalidomide' case, 'where the whole purpose ... was to put pressure upon [Distillers] in the lawful conduct of their defence'.[6] The conclusion seems inescapable that the new provision would provide no assistance should a matter similar to that in issue in Attorney-General v Times Newspapers Ltd[7] come before

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1. Ibid.
2. Ibid.
3. Attorney-General v English, supra, at 967 (D.C.) and 287 (H.L.(E.)).
4. Ibid., at 967.
5. Supra.
6. Ibid., at 288.
7. [1974] A.C. 273 (H.L.(E.)).

the English courts again. Yet there may be clear moral justification for certain kinds of social pressure, as was undoubtedly the case in the 'thalidomide' proceedings. It seems totally unacceptable that a person in the position of the Sunday Times' editor - who considered it his duty to come to the assistance of the thalidomide victims - should come under threat of conviction for contempt for so doing; and the law thus stands in imperative need of reform to ensure that guilt can no longer arise in such circumstances.

### 9.9.3.6. The position in Nigerian Law

In the case of R v Ojukoko,[1] Tew, J. considered that the 'essence' of contempt lies in 'conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on'.[2] This seems to indicate that, if an equivalent of the 'thalidomide' proceedings were to come before the Nigerian courts, newspaper articles of the kind in issue in Attorney-General v Times Newspapers Ltd.[3] would be held to constitute contempt. Moreover, it is plain that (at common law) no defence of 'public interest' obtains; and (to avoid liability for contempt) discussion must be confined to the narrow limits prescribed by the House of Lords, as previously described.[4]

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1. (1926) 7 N.L.R. 60.
2. Ibid.
3. Supra.
4. See p. 873.

Moreover, the new "defence"[1] provided by the Contempt of Court Act 1981 which (despite its limitations) represents a marked improvement over the common law - forms no part of Nigerian law. Yet the need for reform of the common law is no less imperative in Nigeria than in England itself (for all the reasons previously described; and which will not be reiterated here).

It therefore remains to consider what reforms should be introduced in Nigeria, in the light not only of these factors but also of the constitutional guarantee of freedom of expression enshrined in s 36 of the Nigerian Constitution.[2] Before embarking on examination of this question, however, it is instructive to note the radically different approach adopted in the United States of America to the problem of sub judice publication.

## 9.10. The Contrasting Approach of the United States of America.

In two cases dating from the early years of the twentieth century, the United States' Supreme Court adopted an approach to publications prejudicial to pending proceedings which reflected the common law rules previously discussed. Thus, in Patterson v State of Colo. ex rel. Attorney-General,[3] decided in 1907, the Supreme Court affirmed that publication of matter potentially prejudicial to pending proceedings constitutes contempt; and emphasised that comment and criticism should be postponed till after the conclusion of proceedings. As declared

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1. S 5 is not truly a 'defence', as emphasised by the House of Lords in Attorney-General v English, supra, but is rather a constituent element in primary liability.

2. s 36, Constitution of the Federal Republic of Nigeria, 1979.

3. 205 U.S. 454, 27 S. Ct. 556 (1907).

by Justice Oliver Wendell Holmes Jnr.:

> 'When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied'.[1]

In 1918, in Toledo Newspaper Co v United States,[2] the Supreme Court likewise unheld the conviction for contempt of a newspaper which had 'commented freely on a case pending in court'.[3] The Court did so on the objective basis of the article's 'reasonable tendency' to influence the outcome; and emphasised that the criterion for judging the offensiveness of a publication is '[n]ot the influence [in fact exerted] upon the mind of the particular judge.... but the reasonable tendency of the acts done to influence or bring about the baleful result'.[4]

In 1941, however, in Bridges v California,[5] the Supreme Court adopted a radically different approach. The proceedings concerned two different cases, combined under the Bridges title. In one, the Los Angeles Times had been convicted for contempt for 'warn[ing] a judge not to give probation to two convicts';[6] and, in the other, 'labor leader Harry Bridges had threatened to tie up the entire west coast with a longshoremans' strike if a judge's ruling in a case were enforced'.[7]

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1. See Nelson and Teeter, Law of Mass Communications, 3rd ed., 1978, New York, p. 344, emphasis supplied, citing the judgment at 463.

2. 247 U.S. 402, 38 S. Ct. 560 (1918).

3. Nelson & Teeter, supra.

4. Toledo Newspaper Co v U.S., supra, at 421. It is interesting to note that Justice Holmes, who supported the contempt finding in the 1907 proceedings, was of a different view in 1918. He placed considerable reliance on an early statute on contempt, passed by Congress in 1831 (18 USC c. 21 § 401 (1976)), which provided that 'punishment for

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The majority opinion of Mr Justice Black pointed out that the rules restricting publication of material relating to pending proceedings:

> '...produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height.... An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks'.[1]

Accordingly, rejecting the test of 'reasonable tendency' to prejudice proceedings, the Supreme Court formulated a markedly different criterion, based upon the question of:

> '... whether the publication presented an immediate likelihood that justice would be thwarted - whether there [was] a "clear and present danger" that the publication would obstruct justice'.[2]

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contempts does not extend to any cases "except the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice"'. Justice Holmes, in his dissenting opinion, stressed that '"so near thereto" ... means so near as actually to obstruct justice, and misbehavior means more than unfavorable comment or even disrespect'. (See Nelson & Teeter, supra, citing the judgment at 423).

5. 314 U.S. 252, 62 S. Ct. 190 (1941).

6. Nelson & Teeter, supra, p. 345.

7. Ibid. The facts in both cases accordingly bear more upon contempt through attempting to bring improper influence to bear on a judge rather than on contempt through poisoning the minds of jurors and thus precluding fair trial. However, the principles enunciated by the court - that sub judice rules inhibit publication when public interest is at its height; and that 'a clear and present danger' to the proper administration of justice must be shown - are broad enough to cover all instances of contempt in the context of pending proceedings. For a further description of the principles thus laid down by the Court, see the text below.

1. Bridges v California, supra, at 268-269.

2. Nelson & Teeter, supra, p. 345.

This extension of the 'clear and present danger' doctrine - originally formulated in relation to sedition[1] - constituted a watershed in the Court's approach to sub judice publication. It was followed by another decision in which prejudice to pending proceedings was also in issue to some extent. This was Pennekamp v Florida,[2] where the Miami Herald was fined for contempt for alleging bias on the part of a particular judge on the ground, inter alia, that this would undermine the administration of justice in pending cases.[3] Justice Reed, delivering the unanimous opinion of the Court, acknowledged that some of the comments published by the newspaper were 'directed at pending cases and, moreover, were not even truthful'.[4] He nevertheless declared:

> ''[I]n the borderline instances where it is difficult to say upon which side of the line the offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases'.[5]

The result of these decisions is that this branch of the law of contempt has become virtually a deadletter in the United States. Nor - despite the misgivings voiced by the Supreme Court in Irvin v Dowd[6] - has the Supreme Court abandoned this approach. The law of the United States thus stands in marked contrast to the common law of England and of Nigeria - where all the difficulties attendant upon the sub judice

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1. This was in the case of Schenck v United States, 249 U.S. 47, 39 S. Ct. 247 (1919), per Mr Justice Holmes, as previously discussed in Chapter Five above.

2. 328 U.S. 331, 66 S. Ct. 1029 (1946), discussed in further detail in Chapter Ten below, in relation to the U.S. approach to publications scandalising the court.

3. For the other grounds of the Florida court's decision, see p. 987.

4. Abraham, Freedom and the Court, 4th ed., 1982, p. 161.

5. Pennekamp v Florida, supra, at 347.

6. 366 U.S. 717, 81 S. Ct. 1639 (1961), further discussed below.

rule (as described in the preceding section) continue to bedevil the media and to curtail the public's right to be informed (at the time when interest is most acute) of questions of vital importance to society.

It must, however, be acknowledged that the virtual abolition in the United States of the sub judice restriction has generated its own difficulties. Thus, in Irvin v Dowd[1], the accused was indicted for one of six murders which had been committed in short succession in the vicinity of Evansville, Indiana[2]. Shortly after his arrest, the police and prosecutor issued press releases 'asserting that "Mad Dog Irvin" had confessed to all six murders'[3]. A number of media reports, published or broadcast before his trial, described Irvin as the 'confessed slayer of six'[4]; and public hysteria against the accused ran so high that his counsel was widely criticised for representing him at all[5]. Irvin's attorney applied for a change of venue for the trial and this was granted - but the venue change was made only to a neighbouring county which had received equally prejudicial reports concerning "Mad Dog Irvin". A request for a further change of venue to an area which 'had not received such widespread and inflammatory publicity'[6] was denied on the ground that Indiana law permitted only one venue alteration. When the trial began, it did so with a jury that was

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1. 366 U.S. 717, 81 S Ct 1639 (1961).

2. Two were committed in December 1954 and four in March 1955.

3. Nelson & Teeter, op cit, p 261.

4. Ibid.

5. See ibid. 'The media, by way of excusing the attorney, noted that he faced disbarment if he refused to represent the suspect'.

6. Nelson & Teeter, ibid.

substantially biased against the accused[1]. Irvin was found guilty and sentenced to death.

His appeal came ultimately[2] (in 1961) before the Supreme Court, which ruled unanimously that Irvin had not received a fair trial[3]. Delivering his majority opinion, Mr Justice Clark stressed that:

> '[Courts do not require that] the jurors be totally ignorant of the facts and issues involved .... It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court'.
> [4]

In the particular circumstances, however, 'a barrage' of adverse publicity had been unleashed against Irvin in the six months preceding his trial; and it was clear that 'eight of the 12 jurors finally placed in the jury box believed Irvin to be guilty'[5]. One, for example, had declared that he 'could not ... give the defendant the benefit of the doubt that he is innocent'[6]. Accordingly, in circumstances where Irvin's life was at stake, it was not too much to require that he should 'be tried in an atmosphere undisturbed by so huge a wave of public

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1. 430 prospective jurors were examined by prosecution and defence attorneys and it appeared that 370 (nearly 90 per cent) had formed some view - ranging from suspicion to certainty - on the accused's guilt. Irvin's attorney used up all of his 20 peremptory challenges and the trial proceeded - even though four of the jurors finally empanelled had stated that they believed Irvin to be guilty. See Nelson & Teeter, ibid.

2. Some delay resulted from the assertion that he had failed to exhaust state remedies. For details, see Nelson & Teeter, ibid., n 29.

3. A new trial was accordingly ordered, in which Irvin was again convicted - but this time sentenced only to life imprisonment. See Nelson & Teeter, ibid, p 262.

4. Irvin v Dowd, supra, at 728.

5. Ibid., at 727.

6. Ibid., at 728. Another had acknowledged that he had somewhat fixed opinions about Irvin's guilt; and one pointed to the difficulties of forgetting what had been seen and heard through media reports.

passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt'.[1]

Delivering a concurring opinion, Mr Justice Frankfurter denounced the high incidence of 'trial' by inflammatory media reports and warned that legal restrictions might yet be imposed on the media in order to protect the constitutional right to a fair trial.[2] To date, however, this 'thinly veiled threat'[3] has not been implemented; and the principle established by Bridges v California[4] continues to hold good.

The objection that unrestricted publicity may result in prejudice to fair trial - as in Irvin's case - is, however, a serious one. The right to fair trial is as important as the right 'to receive and impart ideas and information without interference';[5] and the latter should not be secured at the expense of the former. Some solution to the dilemma must accordingly be found.

The difficulty stems mainly - as is clear from Irvin v Dowd - from the inability of lay jurors to exclude prejudicial media reports from their minds and to focus on the legally admissible evidence alone. Jury trial

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1. Irvin v Dowd, supra at 728.

2. Justice Frankfurter emphasised that: 'This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system - freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors were poisoned, the poisoner is constitutionally protected in plying his trade'. ( Ibid., at 730.)

3. Nelson & Teeter, op.cit., p. 263.

4. Supra.

5. This is, of course, the formula contained in the Nigerian guarantee of freedom of expression.

is, of course, rare in Nigeria (as previously explained)[1]; but, since it does occur, the difficulty cannot be ignored; and some solution to the problem must therefore be found. The particular circumstances of Irvin's case suggest at least one possible via media. It is clear that in this case (as also in Rideau v Louisiana[2]), prejudice to fair trial could have been avoided by the simple expedient of allowing a change of venue to an area which had not been saturated with adverse publicity. If this had been done, it would have been relatively simple to empanel a jury that had not pre-judged the guilt of the accused.

It must, of course, be acknowledged that this solution may not always be feasible. In a case of national concern, such as the assassinations of John and Robert Kennedy, media coverage will inevitably extend to every corner of the country. In such cases, the answer may possibly (though this is doubtful) lie in enjoining police and counsel not to disclose prejudicial information to the media - as was, in fact, done in the context of Robert Kennedy's assassination.[3] Yet this 'solution' is open to two-fold objection. First, it cannot prevent publication of prejudicial

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1. See p. 758.

2. 373 U.S. 723, 83 S. Ct. 1417 (1963). Here Rideau had been charged with robbery, kidnapping and murder. The day after his arrest, a movie (with soundtrack) was made of a 20-minute "interview" between Rideau and the local sheriff who 'interrogated the prisoner and elicited admissions that Rideau had committed the bank robbery, the kidnapping and the murder': Nelson & Teeter, op.cit., p. 263. The filmed interview was broadcast by a local TV station on three separate occasions and was estimated to have been seen by almost two-thirds of the community. Rideau's attorneys sought a change of venue, but this was denied; and Rideau was tried and convicted (and sentenced to death). On appeal to the Supreme Court, certiorari was granted and a new trial ordered. Reasons given by the Court for so ordering included the fact that three of the 12 jurors had seen the film, as well as the 'kangaroo court' atmosphere which had been generated.

3. See Nelson & Teeter, supra, pp. 256-257. Thus, for example, the Los Angeles Police Chief was very careful in answering media questions after the arrest of Sirhan Bishara Sirhan and 'told reporters that even if Sirhan confessed, that news would not be released in order to avoid prejudicing the case'. The local mayor was not so scrupulous, however, and disclosed considerable prejudicial information, including an entry in a notebook of Sirhan's reading: "Kennedy has to be assassinated before June 5, 1968".

information obtained from other sources.[1] Secondly - and even more significantly - it is in principle unacceptable: for what it entails is simply a ban on publication imposed at a different level, and hence is just as much a derogation from freedom of expression.

The only solution lies therefore in the removal of the factor which provides the principal rationale for the sub judice restriction - the injection into the judicial process of lay persons who lack the training and experience required to exclude adverse media reports from their minds and to focus on the legally admissible evidence alone. The jury system should therefore be abolished;[2] and the task of resolving conflicts within society through legal mechanisms should be entrusted to those who are properly equipped for this role. The conclusion is inescapable that this provides the only way in which adequate protection can be accorded both freedom of expression and the right to fair trial: both of which are equally important; and neither of which should be allowed to prevail over the other.

In summary, then, it is submitted that the United States' approach - which has resulted in the sub judice rule becoming a virtual deadletter - has considerable merit. The disadvantage to which it may give rise, through poisoning the minds of lay jurors (as illustrated by Irvin v

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1. Thus, for example, (again in the Robert Kennedy instance), 'videotaped television coverage of a pistol being wrestled away from Sirhan as Senator Kennedy lay dying on the hotel floor was rerun repeatedly by all three major television networks; and this would make the task of finding "unprejudiced" jurors incalculably difficult if not impossible'. Nelson & Teeter, op cit, p 257.

2. This solution may, of course, seem somewhat extreme in the United States where jury trial is still the norm, but should present little difficulty in Nigeria where trial by jury is, in any event, applicable in Lagos State alone and then only on capital charges.

Dowd), has little significance in Nigeria where trial by jury is - in any event - the exception; and could be totally eliminated through abolition of the jury system. The fact that the United States, with its strong emphasis on jury trial, has nevertheless thought fit to impose strict limitations on the ambit of the sub judice rule in the interests of freedom of expression has considerable significance: and gives pause for thought as to the real need for the sub judice restriction. This factor should be borne in mind in assessing the one issue which remains to considered: the constitutionality of the sub judice rule in Nigerian law, and the reforms which should be introduced.

## 9.11. The Constitutionality of the Sub Judice Rule

It remains to consider both the constitutionality of the sub judice restriction on media freedom and the reforms of which the law stands in need. As regards the former, it will of course be recalled that the 1979 Constitution guarantees the right to 'receive and impart ideas and information without interference'.[1] This right is subject to derogation through laws that are 'reasonably justifiable in a democratic society'[2] for the purpose of 'maintaining the authority and independence of courts'.[3] The constitutionality of the sub judice principle (which cuts prima facie across the guaranteed right but clearly does so to promote the purpose thus recognised) accordingly depends on whether the rule may be considered 'reasonably justifiable in a democratic society'.

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1. s 36(1) Constitution of the Federal Republic of Nigeria, 1979.
2. s 36(3), ibid.
3. s 36(3)(a), ibid.

The answer to this question lies in both the extent of, and the justification for, the sub judice restriction. It needs little further emphasis (in the light of the preceding discussion) that the extent of the restriction is extremely wide. This is the inevitable result of the strict test of liability, the lengthy period during which full discussion is curtailed, and the lack of defences to liability provided by the common law. As for the justification underlying the restriction, this clearly has its greatest force and credibility where trial is to be conducted by jury. In Nigeria, however, jury trial is the exception; and hence the primary need for restriction falls almost completely away. To the extent that jury trial is still applied (in Lagos State, on capital charges) it is submitted that it should be abolished in favour of trial by trained judicial officers alone. In this way, there can be no danger of freedom of the media being purchased at the expense of the right to fair trial.

Even accepting the continuation of the present limited incidence of trial by jury, it is submitted that the sub judice rule goes further than is reasonably justifiable in a democratic society for the purpose of upholding the independence and authority of the courts. The imposition of strict liability cuts across accepted principles of criminal liability: and works especially harshly against all those who are no more than secondary parties in publication and who at present (as earlier explained) may be held liable notwithstanding their total absence of intent (direct or indirect) to prejudice the proper administration of justice. Moreover, the absence of defences to such liability is totally unacceptable; as is the notion that all that is required for conviction is a risk of prejudice that is merely 'more than remote'.[1] Equally repugnant

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1. See p. 828.

is the curtailment of discussion of matters of vital public importance (such as the thalidomide tragedy), which deprive society of full debate on crucial issues at the very time when concern is at its height: and does so for reasons which do not stand up to strict scrutiny. How then can the rules be regarded as constitutional?

In answering this question, it is important to recall the judgment of the European Court of Human Rights in Sunday Times v United Kingdom Government.[1] Here, it will be remembered, the European Court ruled that the restriction placed on the publication by the Sunday Times of its draft article on the thalidomide issue constituted a violation of the United Kingdom's obligations under Article 10 of the European Convention on Human Rights. Article 10 is couched in similar terms to the constitutional guarantee of freedom of expression in Nigeria (and was, of course, the model for the original Nigerian provision[2]). One significant difference, however, is that derogation from freedom of expression is authorised under Article 10 only through laws that are 'necessary' in a democratic society to promote the various interests recognised in the provision; whilst the Nigerian guarantee, by contrast, requires no more than that derogation should be 'reasonably justifiable in a democratic society'. The difference is further emphasised by the interpretation placed on the word 'necessary' by the European Court in the Sunday Times[3] case: viz., that it connotes a 'pressing social need'; with the result that any restriction which does not meet this stringent test must be regarded as a violation of the treaty obligation.

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1. [1979] 2. E.H.R.R. 245.

2. See the section of the Nigerian Bill of Rights, at p. 199.

3. Sunday Times v United Kingdom Government, supra, at para. 59.

It will further be recalled that the European Court believed that the injunction against publication in the Sunday Times case did not correspond to a pressing social need; and that the restriction was accordingly unlawful. It reasons for so holding were, in brief, that the article did not put undue pressure on Distillers, that it was balanced in its treatment and did not therefore prejudge the issues, and that, in any event, there was a vital public interest in full discussion of the thalidomide tragedy and in the determination of where responsibility for it should lie.

It is tempting to speculate as to what the response of a Nigerian court would be if a similar matter were to arise before it for decision. It is submitted that the Nigerian view would also be - notwithstanding the difference between 'necessary' and 'reasonably justifiable' - that the prohibition of publication would be an unwarranted restriction on freedom of the media, and that it could not be squared with the constitutional guarantee of freedom of expression.

This raises considerable doubts as to the constitutionality of the sub judice rule; and it is submitted, for all the reasons previously given, that the law - in its present form - goes beyond the limits of what is 'reasonably justifiable in a democratic society'; and is pro tanto unconstitutional.

This raises the question of how the law should be changed to bring it into line with the constitutional guarantee. It is not proposed to repeat the detailed recommendations previously described. Suffice it therefore to state, in short:

(i) that of the four types of publication generally considered subject to sub judice restriction, a distinction should be drawn between publications

which may prejudice potential jurors (in the limited circumstances in which jury trial applies) or which may put undue pressure on a party to litigation, and those which tend to prejudge issues or to influence witnesses; and that the latter should only constitute contempt in extreme circumstances: in keeping with the doubts expressed above as to whether either type of publication is likely, in any real sense to influence the outcome of particular proceedings or to undermine the administration of justice in general.

(ii) that liability should depend upon mens rea in the form of intent (direct or indirect) to undermine the proper administration of justice; and that the onus should lie on the state to prove this as an essential element of the offence;

(iii), if the above suggestion is considered too radical, that the liability of secondary parties in publication (as identified above) should - at minimum - depend upon personal mens rea, rather than strict or vicarious liability.

(iv) that it should be recognised that only a publication which creates a 'substantial' risk of 'serious' impediment - in the form of a 'clear and present danger' to fair trial may be held to constitute a contempt;

(v) that, in the interests of certainty, cut-off points for the commencement and termination of the restriction similar to those presently provided by the Contempt of Court Act 1981 should be introduced;

(vi) that defences equivalent to the United Kingdom statutory defences of 'innocent' publication and 'innocent' distribution should be enacted; with, however, the additional safeguard that the onus should lie upon the prosecution to prove the relevant knowledge on the part of the publisher or distributor;

(vii) that a general defence of overriding public interest in discussion should be introduced or, at minimum, an equivalent of the present

s 5 of the Contempt of Court Act 1981.

Only if these changes are implemented, will the sub judice restriction in Nigeria (at either common or statutory[1] law) be 'reasonably justifiable in a democratic society' so as to satisfy the guarantee of freedom of expression provided by the Constitution.

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1. The relevant provisions of the Criminal and Penal Codes have largely been left out of account in this study. This is not only because they are seldom invoked; but also because they are so vague as to require considerable interpretation: which would inevitably be derived from common law principles. Moreover, it is explicit in the Penal Code provision (and implicit - given its common law background - in the Criminal Code sub-section) that the statutory liability is also strict: and this, of course, is the principal objectionable feature of the common law (all other deficiencies flowing from this major flaw).

# CHAPTER TEN

# SCANDALISING THE COURT

## 10.1. The Significance of the Law of Scandalising the Court for Media Freedom

'Scandalising' the court is another type of contempt, and one which imposes wide-ranging restraint upon the media. The rule against scandalising the court prohibits, in essence, personal vilification of judges or the judiciary, or the making of allegations of bias on their part. Reasoned criticism is said, in principle, to lie outside the ambit of the offence: but whether this is so in practice is a matter of some doubt.[1]

The rationale for the rule is the need to shield the judiciary from adverse comment which could have the effect of undermining public confidence in the proper administration of justice. The rule is founded on the ideology of judicial infallibility and impartiality, with special emphasis on the latter, since this is a cornerstone of the adversarial common law system. However, since the ideology does not correspond with reality, the rule is commensurately suspect: and its effect, in practice, is clearly to prevent the publication by the media (amongst others) of comment and criticism on the manner of performance of the judicial role which might otherwise serve the valuable function of

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1. See, for example, S v Van Niekerk, [1970] 3 S.A. 655 T, a South African decision based on common law principles, which clearly shows how thin the dividing line is between lawful criticism and the offence of scandalising the court. This is further discussed at p. 947.

reminding society that the judiciary is as vulnerable to error as any other human institution.

The law is extremely wide-ranging in its ambit, encompassing all manner of abuse of judicial officers as well as any imputation of bias on their part. Its width is - in practice - exacerbated by the fact that it is subject to trial by the summary procedure, in which the very judicial officer aggrieved by adverse comment is given the role of arbiter. Moreover, the record of past cases (especially those from Commonwealth countries) clearly reveals what can only be described as judicial 'hyper-sensitivity' to criticism, manifested in the frequent imposition of heavy penalties for aspersions against the judiciary which seem hardly to merit such punishment. The result is to impose a restriction on publication which cuts both wide and deep: and which inevitably generates a considerable impetus to self-censorship on the part of the media.

In addition, liability for contempt under this head is strict;[1] and is thus governed by an objective test of whether a publication is calculated to undermine respect for the judiciary, rather than by the subjective intent of the accused in this regard. Furthermore, the common law provides few defences against conviction; the most notable lacuna being perhaps the irrelevance of the truth of the allegations made. Although an equivalent of the defamation defence of 'fair comment' has been recognised by the common law, there is no equivalent of the statutory defences of unintentional publication or distribution which have been introduced in the civil law of defamation (in some parts of Nigeria at least). In addition, there is no general defence of public

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1. This, of course, is similar to the rule relating to publications infringing the 'sub judice' rule, as previously described.

interest in publication; and the alleged contemnor's motives (no matter how altruistic) are largely irrelevant.[1]

In England - the source of the rule against 'scandalising' the court - the need for any criminal prohibition at all on such conduct has recently been queried by the Phillimore Committee on Contempt of Court;[2] and it has been recommended that the common law offence be abolished, and replaced by a new offence, chargeable on indictment only.[3] In Nigeria, however, as in other Commonwealth countries, the received rule continues to operate in its full vigour: and the result is to impose a restriction on freedom of the media which serves, in practice, to inhibit to an inordinate degree the publication of criticism of the judicial branch of government and to promote yet further the myth of judicial impartiality. In this regard, it is salutary to recall the aphorism "forewarned is forearmed"; and to query, accordingly, whether this restriction on freedom of expression is indeed 'reasonably justifiable in a democratic society'.[4]

## 10.2. The Nigerian Sources of the Rule Against Scandalising the Court.

The sources of the Nigerian law of contempt in all its various aspects have already been described;[5] and, for present purposes, may it suffice to

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1. The accused's good intentions may serve to mitigate punishment, but will not exonerate him from conviction.

2. The 'Phillimore Report; Cmnd 5794, 1974.

3. The Phillimore recommendations in this regard, not yet implemented in the United Kingdom, are further described at p. 979.

4. The constitutionality of the rule, in the light of the guarantee of of freedom of expression contained in s 36 of the Constitution of the Federal Republic of Nigeria, 1979, is examined further at p. 990.

5. See p. 699, et seq.

note the provisions of the Codes relevant to 'scandalising' the court. Those in the Criminal Code are as follows:

(i) s 133(4), which prohibits 'any speech or writing ... calculated to lower the authority of any person before whom [a judicial] proceedings is being had or taken';[1] and

(ii) s 133(9), which likewise prohibits 'any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceedings is being had or taken'.[2]

The penalty prescribed for either offence is three months' imprisonment.

The relevant provisions of the Penal Code are:

(i) s 155, which makes it an offence 'intentionally [to] offer any insult ... to any public servant [whilst he] is sitting in any stage of a judicial proceeding';[3] and

(ii) s 416, which makes it an offence to 'excite or attempt to excite feelings of disaffection ... against the administration of justice in Nigeria or any [state] thereof'.[4]

The penalties prescribed for these offences are, respectively, imprisonment for up to six months (or fine of £20, or both); and imprisonment for up to seven years (or fine of unspecified amount or both).

However, as previously indicated, little reliance is placed in practice on these provisions; and the rules which count in general are those derived from English common law, which apply within Nigeria by virtue

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1. s 133(4), Criminal Code, Cap 42.

2. s 133(9), ibid.

3. s 155, Penal Code, Cap 89

4. s 416, Penal Code (NorthernRegion) Federal Provisions Act, Act no. 25 of 1960.

of the reception process previously described.[1]

## 10.3. The Rationale for the Rule Against Scandalising the Court.

Publications which scandalise the court are seen as threatening - not the fairness of trial of a particular litigant or accused[2] - but the general administration of justice as a whole. They do so (it is alleged) by casting doubts upon the capacity of judicial officers to discharge the heavy onus of impartial decision-making entrusted to them by the legal system; and, thus, by undermining society's confidence in the machinery it has established for dispute-resolution.

The rationale underlying this branch of the law of contempt has been graphically summarised by Wilmot, in eighteenth-century proceedings;[3] and, even today, it is difficult to improve upon his archaic but evocative phraseology:

> 'The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his Judges, and excites in the minds of his people a general dissatisfaction

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1. See the section on the Sources of Nigerian Law, at p. 129, et seq.

2. For this reason, the timing of publication which is crucial under the sub judice rules above, is irrelevant in this context. As regards scandalising the court, it does not matter whether the publication is made before, after or during the pendency of proceedings. In the latter instance, however, where publication does occur pendente lite, this may be an additional ground for ruling that it constitutes contempt. See G.J. Borrie and N.V. Lowe, The Law of Contempt, London, 1973, p. 153.

3. This was in Almon's case, (1765) Wilm. 243; 97 E.R. 94. Here the defendant had published a pamphlet accusing Lord Mansfield, the Lord Chief Justice, of having acted 'officiously, arbitrarily, and illegally'. The judgment which Wilmot, J. prepared in the case was in fact never delivered, 'apparently because it was later discovered that the rule nisi to attach Almon had been misentitled 'The King v Wilkes and [Almon' counsel] 'as a man of honour' could not consent to its amendment'. See C.J. Miller, Contempt of Court, London, 1976, p. 21. New proceedings were begun but were dropped following a change of government.

> with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and ... calls out for a more rapid and immediate redress than any other obstruction whatsoever.... To be impartial and to be universally thought so are both absolutely necessary for ... justice....'.[1]

Punishment of publications scandalising the court is accordingly considered imperative - not to protect individual judges in their personal capacities[2] - but to uphold public confidence in, and respect for, the administration of justice as a whole.

## 10.4. No Time Limit to the Operation of the Rule

By contrast with the sub judice rule, which restricts publication only during the period when proceedings are pending or in progress (and, hence, are vulnerable to prejudice or interference), the rule against scandalising the court has continuous operation, unrelated to particular litigation. This is in keeping with the underlying purpose of the rule, which is to safeguard public respect for the administration of justice in general: for it is clear that such respect can be diminished at any time by comment which scandalises the court. The point has been

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1. See ibid.

2. See, for example, the judgment of the Privy Council in McLeod v St. Aubyn, [1899] A.C. 549 where Lord Morris, having described the 'power summarily to commit for contempt of Court [as] necessary for the proper administration of justice', emphasised that 'It is not to be used for the vindication of the Judge as a person'; and that the judge who seeks personal redress must do so by bringing an action 'for libel or criminal information'.

crisply stated in R v Onweugbuna and another,[1] in which it was contended by the defence that 'it is not contempt of court to say this or that about a judge or judicial officer unless there are pending proceedings, or perhaps concluded proceedings, in relation to which the judge or judicial officer is impugned'.[2] The court had no hesitation in rejecting this argument. It acknowledged that the 'attack made must have a relation to the administration of justice by the courts, judge or magistrate attacked' but declared that 'it would be an absurd limitation of the law of contempt to say that there must be reference to a particular case tried, being tried or about to be tried. The mischief punishable can be done as effectively by general attack as by attacks upon conduct which concerns a particular case'.[3]

## 10.5. The Types of Publication Subject to the Rule.

Publications which scandalise the court may be divided into two broad categories - those which contain 'scurrilous abuse' of a judge; and those which impugn his impartiality. A third category of publication - those which cast doubt upon the competence of a judge to perform his duties, or the correctness in law of a particular decision - is, in principle, not regarded as contempt.[4]

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1. [1958] 2 E.N.L.R. 17, reproduced by Chief Gani Fawehinmi, The Law of Contempt in Nigeria (Case Book), Surulere, 1980, pp. 243-248. The case is further described below; but - in outline - the allegation in issue was that a particular judge had undertaken to impose especially severe penalties on supporters of a certain political party, if and when they appeared before him. It is thus clear that the comment was not made in relation to any particular case then pending or in progress before the courts.

2. See Fawehinmi, ibid., p. 247.

3. Ibid., pp. 247-248.

4. See p. 937 below.

10.5.1. Scurrilous abuse of a judge or the judiciary in general.

Although this type of publication clearly constitutes a contempt under the common law which Nigeria has inherited from England, there are no reported Nigerian decisions illustrating or developing the basic common law principles. Guidance must accordingly be sought from English decisions to ascertain the type of publication which is likely to be considered a contempt of court under this head.

In 1900, in the leading case of R v Gray,[1] the trial judge in obscene libel proceedings warned the press against including (and thereby publishing) the obscene material in issue in their reports of the trial. Gray, the editor of the Birmingham Daily Argus, took umbrage at this implied aspersion on press competence, and published[2] an article, headed 'A Defender of Decency', containing the following passage:

> 'The terrors of Mr Justice Darling will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of conceit and empty-headedness, who admonished the Press yesterday'.[3]

In proceedings against Gray for contempt, Lord Russell, C.J. emphasised that the article went far beyond the bounds of legitimate

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1. [1900] 2 Q.B. 36; and (1900) 82 L.T. 534, where the impugned article is reproduced in full.

2. The article was published on the following day, when Wells (the defendant in the obscene libel prosecution) had already been sentenced. The fact that the article was nevertheless found to constitute contempt illustrates the point, (discussed above) that the timing of publication is irrelevant in this branch of the law of contempt.

3. See (1900) 82 L.T. 534.

criticism[1] and amounted to 'personal scurrilous abuse of a judge as a judge'.[2] Gray, who had offered his apologies, was fined £100 and ordered to pay £25 costs.

In 1922, in Vidal's case,[3] the accused - who was dissatisfied with the outcome of a particular proceedings and who apparently believed that the President of a Division[4] of the High Court had been 'a party to a conspiracy to suppress evidence'[5] - paraded near the Law Courts carrying a sandwich board inscribed as follows:

> Is Judge Sir Henry Duke afraid to prosecute me? I accuse him to be a traitor of his duty and of defrauding the course of justice for the benefit of the Kissing Doctor'.[6]

The Divisional Court considered this 'scurrilous abuse of the worst description';[7] and he was sentenced to four months' imprisonment - a severe sentence which was exacerbated by his unrepentant attitude in court.[8]

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1. This aspect of the judgment is considered further below, in the context, first, of whether criticism amounts to contempt; and secondly, of whether defences based upon 'justification' and 'fair comment' should be introduced into Nigerian law.

2. R v Gray, [1900] 2 Q.B. 36 at 40.

3. The Times, 14 October 1922.

4. This was the Probate, Divorce and Admiralty Division of the High Court.

5. Miller, op.cit., p. 185.

6. Miller, ibid.

7. Ibid.

8. See Borrie & Lowe, op.cit., p. 156.

In R v Freeman,[1] in 1925, another dissatisfied litigant wrote to the presiding judge,[2] accusing him of being 'a liar, a coward, [and] a perjuror' and alleging that he had 'aided Lord Sheffield in a felony'.[3] It was held that these letters contained the 'grossest calumny and vituperation'; and that they constituted 'as gross a contempt as had lately been brought to the knowledge of the Court'.[4]

A further illustration may be derived from the Privy Council case of McLeod v St Aubyn,[5] where a local newspaper published a letter which cast severe aspersions upon the acting Chief Justice of St Vincent. It described him as '[a] briefless barrister, unendowed with much brain who religiously attended with his empty bag at the several Courts of London in the forlorn hope of picking up a case'; and who subsequently ' [became] an assiduous hanger-on at the Colonial office' until such time as 'in an evil moment for St Vincent he was appointed a police magistrate'. It criticised his 'demeanour in the Magistrate's Court [as] [having] been anything but dignified' and accused him of having 'indulged in offensive expressions to litigants before him, which were discreditable to one in his position'. Finally, warming to its theme, the letter depicted him as '[a] man of the Torquimada type, narrow, bigoted, vain, vindictive and unscrupulous, [who] takes advantage of his position to vent his spleen upon those whom he hates...'.[6]

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1. The Times, 18 November, 1925.
2. Roche, J.
3. Borrie & Lowe, supra.
4. Ibid.
5. [1899] A.C. 549.
6. See ibid.

Surprisingly, it was not the editor or proprietor of the newspaper who were charged with contempt, but an individual who had merely lent his copy of the newspaper (unread) to the local library.[1] The Privy Council took the view that the accused had not intended to publish, and so was not guilty of contempt. This aspect of the case has already been discussed above;[2] and what matters for present purposes is that the content of the letter must, surely, be considered as scurrilously abusive as the allegations in issue in R v Gray.[3]

Also illuminating is the Privy Council decision in Re S.B. Sarbadhicary,[4] where a barrister - who had been interrupted by a judge in the course of his argument in court - published an article in which he queried whether the Chief Justice was 'qualified enough for the due discharge of the routine of work' and described him, in heavily sarcastic terms, as a 'wonderful [judge] who punishes an assailed and not an assailant with miraculous readiness and activity' and who 'punishes not the wrongdoer, but the wronged and thus ... upholds justice'.[5]

The Privy Council had little difficulty in finding that the article constituted a contempt.[6]

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1. See p. 798 above, where this aspect of the case has already been described.

2. Ibid.

3. Supra, and see also Borrie & Lowe, op.cit., p. 155.

4. (1906), 23 T.L.R. 180.

5. Ibid.

6. The case did not, in fact, involve a prosecution for contempt - but nevertheless has relevance for the law of contempt. 'The High Court of Allahabad had suspended the barrister from practice [following this publication] under its statutory power to do so for reasonable cause.... The Privy Council [considering that the article constituted a contempt] advised that the publication was sufficient cause to justify the suspension'. See A. Arlidge and E. Eady, The Law of Contempt, London, 1982, p. 160.

On the other hand, a further Privy COuncil decision - in Re Special Reference from the Bahama Islands[1] - shows how difficult it may be to predict what view the courts will take of particular allegations. Here a local newspaper published a letter criticising the Chief Justice of the islands for incompetence and for shirking his work.[2] The Privy Council ruled that it was not a contempt[3] on grounds which unfortunately, are far from clear, as no reason for the Committee's conclusion is reflected in the report of the proceedings. Suffice it therefore to note that certain of the wording of the letter would certainly appear to have seen abusive: so that the case graphically demonstrates the difficulty of determining what amounts to scurrilous abuse.

The decisions discussed above are all more than half a century old. There is no modern English authority on publications constituting 'scurrilous abuse' and it is questionable to what extent reliance may still be placed - in 1983 - on precedents stemming mainly from the turn of the century. The dearth of authority may also indicate - not that publications inveighing against the judiciary have ceased - but that

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1. [1893] A.C. 138.

2. See Borrie & Lowe, op.cit., p. 158.

3. The Judicial Committee did, however, consider that it might ground an action for libel.

judges have begun to take a more robust attitude to criticism. More recent cases from other Commonwealth jurisdictions, however, reveal continued judicial sensitivity - amounting at times to what can only be described as "hyper-sensitivity" - to the publication of such matter. It is to be hoped, therefore, that Nigerian courts will not be persuaded to follow these decisions. The fear, however, is that in a society still beset by considerable problems and tensions, Nigerian judges may also err on the side of overreaction.[1]

The Commonwealth cases in question accordingly merit brief[2] consideration. In the Australian case of R v Dunbabin,[3] the Sydney Sun published an article accusing the High Court (which had allowed an illegal immigrant to remain in the country) of 'knocking holes' in Federal legislation

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1. This postulates that judicial sensitivity is linked to, and reflects, the general level of public confidence in society and its organisation - including the administration of justice. An alternate hypothesis is that judicial sensitivity is simply one facet of a prevailing 'Tory' ideology; and that it will accordingly continue for as long as that ideology holds sway. This supposition is discussed at p.993 below.

2. No apology is tendered for the limited nature of this review. The decisions of Commonwealth courts are persuasive only in Nigeria and it does not therefore seem justified, particularly given the constraints of space and time, to devote further attention to them.

3. (1935), 53 C.L.R. 434.

and of handing down a decision which was 'to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia'. It continued with a rallying cry for 'some gallant champion to rid [the country] of this pestilent Court' and concluded by suggesting that the High Court be given some real work, so that it would no longer have the time to 'argue for days on ... the precise difference between Tweedledum and Tweedle dee'.[1]

The article was held to constitute a contempt, on the ground that its 'effect and purpose ... was "to represent that the Court exercises its ingenuity in order to defeat legislation to which great public importance attaches". This, together with the suggestion that only the "Little Brothers of the Soviet" were pleased by the decision was held to have the tendency to weaken ... [public] confidence ... in court decisions'.[2] The decision seems unduly harsh, however, for the article - even though mocking in tone and disrespectful to the point of insult - does not seem (objectively) to warrant being adjudged as 'scurrilous abuse'.

In Canada, in R v Western Printing and Publishing Ltd.,[3] the Western Star accused the Chief Justice and his colleagues (who had warned the media against publishing material relating to pending proceedings) of 'intimidation of the most blatant variety (the shut-up-or-else type, that is)' in a manner which 'ha[d] a faint tinge of the iron-curtain to it' and from which it could only be assumed that 'the admonition was another move in the 'jump-on-the-press' campaign'. The article concluded

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1. Ibid.

2. Borrie & Lowe, op.cit., p. 159.

3. (1954), 111,C.C.C. 122.

by warning that 'The next step [would] be the seizure and shut down of all the Island's papers (except one) a la Juan Peron'.[1]

This was found by the Newfoundland Supreme Court to constitute contempt.[2] Again, the decision seems difficult to endorse; and reflects, it is submitted, what can only be termed excessive judicial sensitivity.

In more recent Canadian cases, it has been held 'scurrilous' and hence contemptuous to 'sa[y] that a judicial decision was "silly" and could not have been made by a sane judge; [to] cal[l] a court a "mockery of justice"; [and to] writ[e] of a particular proceeding that "the whole thing stinks from the word go".[3] Furthermore, the New Brunswick Court of Queen's Bench has even gone so far as to 'advanc[e] the extraordinary assertion that criticism which was "ungentlemanly"'[4] constituted a contempt. Again, it seems that these decisions go far beyond what is necessary to uphold public respect for, and confidence in, the administration of justice; and it is urged that the Nigerian judiciary - should similar publications come before it for decision - should resolutely set its face against following these Commonwealth examples.

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1. Ibid.

2. Walsh, C.J. came to this conclusion on the ground that the article exceeded "the bounds of temperate and fair criticism" because it "imputed improper motives to those taking part in the administration of justice" and, in addition to its insulting words, "accuse[d] them of the assumption of dictatorial powers"'. Borrie & Lowe, op.cit., p. 164.

3. Robert Martin: 'Criticising the Judges', (1982) 28 McGill Law Journal pp. 3-30, p. 15. The decisions in question are Oullet v The Queen, [1976] C.A. 788, (1977) 72 D.L.R. (3d)95; R v Murphy (1969)1 N.B.R. (2d) 297, (1969) 4 D.L.R. (3d) 289 (S.C.); and Re Landers, (1980) 31 N.B.R. (2d) 113 (Q.B.).

4. Martin, ibid., p. 16. The decision in question is Re Landers, supra.

10.5.2. Publications imputing bias on the part of judges

Publications of this nature also constitute contempt because of their tendency to undermine public confidence in judicial officers as impartial and objective arbiters in dispute-resolution. A clear illustration of a publication alleged to constitute contempt on this basis is provided by the case of R v Jackson.[1]

Here, the accused was the editor and proprietor of the Lagos Weekly Record. Following the dismissal by the Acting Chief Justice of proceedings brought by Eshugbayi Eleko,[2] against the Officer Administering the Government

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1. (1925) 6 N.L.R. 49.

2. See Eshugbayi Eleko v Baddeley and another (1925) 6 N.L.R. 65. Here the defendant, Baddeley, as Officer Administering the Government of Nigeria, had made an order under the Deposed Chiefs Removal Ordinance (Cap 78 of the Laws of Nigeria) requiring the plaintiff to leave the Colony and adjoining Provinces. The defendant, Thomas, was acting as Chief Secretary to the Government at the time the order was made, but had no hand in its issue. An application by Eshugbayi to the Supreme Court to have the order set aside was refused. On the same day, the plaintiff commenced the proceedings in question, asking for a declaration that the order was "of no effect and void" and also for an injunction. The Acting Attorney General moved the Court to stay or dismiss the action on the ground that it was frivolous and vexatious and an abuse of the process of the Court.

   The Divisional Court (per Webber, Acting C.J.) held that the action could not be maintained against the defendants personally, that it was oppressive and vexatious and that it must be dismissed.

   In reaching this conclusion, the court emphasised that the second defendant had had no part whatever in the making of the Order; so that 'there [was] not the slightest cause of action disclosed against him on the writ' and the claim against him was clearly vexatious and oppressive and a gross abuse of the process of the Court.

   As regards the first defendant, the court stressed that there was no ground for bringing suit against him in his personal capacity. He had issued the Order in his official capacity, and there was nothing to indicate that he had acted ultra vires in doing so. Accordingly, there was no basis for his personal liability; and the plaintiff should instead have proceeded by Petition of Right.

(Continued)

and the Chief Secretary, the accused, 'who was a strong protagonist of the cause of the plaintiff in that case',[1] published two articles in his newspaper under the headings 'A Great Constitutional Issue' and 'The Dangers of the Judicial System of Nigeria'. In these, the accused referred to the Eshugbayi case and 'to other cases in which the Government ha[d] been concerned'[2] and alleged that 'the judges of this Court are under the subjection of the Executive, and will not and dare not give a decision unfavourable to the Government, and have been compelled to invent plausible arguments in order to be able to record decisions compatible with the wishes of the Executive'.[3]

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Furthermore, the decision to depose the plaintiff from his position of Native Chief and to ban him from the areas in which he had exercised his influence had 'already been adjudicated upon by a competent authority, namely the Governor' and the Court could not 'assume the functions of a Court of Appeal and reopen the whole inquiry with a view to ascertaining whether the Governor's decision' had been correct. To do so might also compel disclosure of the views of the officers who had advised the Governor in making the decision, and this the Court was not prepared to sanction for fear of placing a 'serious impediment ... upon the frankness which ought to obtain among [administrative] staff', as stressed in Local Government Board v Arlidge, [1915] A.C. 120 (H.L.(E.)), at 137.

It thus appears that the decision was correct in principle, though the last reason given by the court perhaps reflects an excessive determination not to intervene in executive decisions; whilst the fear expressed by the Court that the canvassing of the reasons for deposing Eshugbayi would undermine the effective operation of the public service does not seem justified. Accordingly, there may have been some kernel of truth in the allegation that the court had been 'executive-minded' in its decision, as Jackson - as explained below - allege

2. R v Jackson, supra, at 52.

3. Ibid.

Combe, C.J. pointed out that this was the 'first occasion on which th[e] Court ha[d] been called upon to exercise its jurisdiction in a case of contempt of this nature';[1] and accordingly considered it appropriate to canvass the English precedents which provide authority for the 'jurisdiction vested in the Court to deal summarily with such contempt, [as well as] ... the principles which should govern the decision of the Court in the exercise of that jurisdiction.'[2]

He accordingly referred to the judgment of Lord Morris in the Privy Council in McLeod v St Aubyn[3] and to that of Lord Russell of Killowen, C.J. in R v Gray;[4] and considered it 'unnecessary ... to refer to any other authorities'.[5] In his view: 'There [was] no doubt that th[e] Court ha[d] the power to punish by summary process any person who publishes matter which is calculated to bring th[e] Court into contempt'.[6]

Combe, C.J. then proceeded to consider the content of the articles in issue[7] and had no hesitation in concluding (as was, apparently, also conceded by the defence)[8] that the articles 'contain[ed][a] scandalous reflection upon the integrity of th[e] Court and that [their] publication ... constitute[d] a gross contempt of Court'.[9]

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1. Ibid., at 50.
2. Ibid.
3. [1899] A.C. 549 at 561, per Lord Morris.
4. [1900] 2 Q.B. 36 at 40.
5. R v Jackson, supra at 52.
6. Ibid.
7. This is described at p. 914 above.
8. R v Jackson, supra, at 52 where Combe, C.J. states: 'It has not been, and it cannot be, denied that these articles contain scandalous reflection upon ... this Court....'.
9. Ibid.

Turning to the question whether the Law Officers of the Crown had acted properly in bringing the articles to the attention of the Court (as the learned judge had no doubt they had), Combe, C.J. then gave utterance to the following observations on the role of the law of contempt in a colonial context. The passage is somewhat lengthy but nevertheless merits reproduction in full:

> 'It may be that if similar articles referring to a Court in England were published in England, the Court would be satisfied to leave to public opinion such scandalous reflections on the integrity of the Court. Indeed, if I was satisfied that the articles in question were read only by the more intelligent and advanced members of the communities of this Colony and Protectorate, I might be content to leave the matter to public opinion, being fully convinced that by such persons these reflections upon the integrity of the judges of this Court would be rejected with the contempt which they deserve, and that the articles would do more harm to the reputation of the editor and proprietor of the newspaper than to the administration of justice.
>
> The conditions in this country are, however, very different to those in England, and in the smaller and more advanced Colonies. A large majority of the populations of this Colony and Protectorate consists of primitive people, who until the recent advent of the British Administration had, I fear, but little reason for trusting in the integrity of the Courts which adjudicated in their affairs. It is, I think, generally recognised that one of the greatest blessings brought to this country by the British Administration is the establishment of an absolutely impartial judiciary, and I have every reason to believe that the inhabitants of this Colony and Protectorate have complete confidence in the British Courts which have been established, and rejoice in having Courts to which they can come with certain knowledge that justice will be administered without fear and without favour.
>
> This man Thomas Horatius Jackson, using the paper of which he is the editor and proprietor as his instrument, has sought to persuade

> the public that no confidence can be placed in this Court since the Judges are afraid to give decisions which might not meet with the approval of the Executive. These wicked aspersions on the integrity of Judges of this Court must, through the medium of this newspaper, reach many of the less advanced members of the communities of the Colony and Protectorate who cannot be expected to appraise at their true value statements made in the leading articles of that newspaper. Hence incalculable damage may be done by the publication of the articles which have given rise to these proceedings. Indeed I cannot imagine any greater evil which could befall the people of this Colony and Protectorate than that Jackson should succeed in his efforts to render this Court contemptible in the eyes of the public.
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> Again, I have no hesitation in saying that, unless there are any matters which can be taken in consideration in mitigation of the punishment[1] which must be imposed for this gross contempt of this Court, it would be my duty to commit Jackson to prison for a very considerable time'.
> [2]

The judgment provides illuminating insight into the complacency and paternalism which underlies not only British colonial administration but also the entire concept of scandalising the court constituting a contempt. The inference is plain that the educated and sophisticated can be allowed to penetrate the myths of judicial infallibility and impartiality: but not so the remainder of society. The latter must be kept in awe of the courts; and must not be allowed to query whether they are, in fact, performing their role adequately, and meeting the responsibilities entrusted to them.

The court, moreover, seems to have taken an unduly harsh approach to the two articles, which - in view of the decision which prompted their

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1. In the event the court was able to find certain mitigating factors - viz, that Jackson, had 'admitted his offence, humbly apologise[d] to the court and submitt[ed] himself to the merciful consideration of the court'. Ibid., at 55. Accordingly, the accused was sentenced to two months' imprisonment, and ordered to pay £25 in costs.

2. Ibid., at 52-53.

publication, as described above[1] - may well have contained a kernel of truth. In the circumstances prevailing in Nigeria in those early days of colonial rule, it is difficult to believe that there was not some identity of interest between executive and judicial branches of the colonial government: and that this would not inevitably have undermined judicial independence to some extent. If that were indeed the case, public confidence in the general administration of justice would have been better served by allowing the publication of these allegations: as the first step in the taking of remedial action.

A further Nigerian decision on the offence of 'scandalising' the court is that in R v Service Press Ltd.[2]

The proceedings arose out of the publication in the Daily Service of 4 November 1952 of an editorial headed '"Gentleman A.J. Sangster"',[2] which charged, inter alia, that he was in cahoots with the judiciary. Mr Sangster (who was the Vice-President of the Ibadan branch of the N.C.N.C.[3]) was alleged, in the editorial, to have 'been heard to boast on several occasions of his close intimacy with white officials descending from the very top to the bottom, and even including Her Majesty's High Court Judges'.[4] It continued:

> 'Mr Sangster was audacious enough to predict the judgment in a recent famous case long before judgment was given and, surprisingly enough his prediction came true to the very letter. In another famous case now in progress, Mr Sangster has been intimidating witnesses and making free use of the judge's alleged mandate in a most scandalous and high-handed manner'. 5

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1. See p. 913.

2. (1952) 20 N.L.R. 96, reproduced by Fawehinmi, op.cit., pp. 230-233.

3. See Fawehinmi, ibid., p. 230.

4. Ibid., p. 231. The N.C.N.C. was one of the three major political parties at the time, as previously explained in the section on the history of Nigeria at p. 82.

5. Ibid.

Two different aspects of the law of contempt were thus brought into issue: scandalising the court and interfering with proceedings in progress. The former is the more important, however, as the court, in the end, preferred to make no ruling in relation to the latter (as further explained below).

The court drew attention to the word 'even' (in the first passage from the editorial quoted above) and pointed out that this 'stress[ed] the fact that High Court Judges, who might have been expected to stand aloof from political machination, had not done so'.[1] Referring to the allegation that Mr Sangster had been 'audacious enough' to predict the outcome of certain proceedings and that this prediction had come true 'to the very letter', the court rejected the defence contention that readers would understand this as meaning that Mr Sangster had 'got hold of th[e] judgment through a typist or by some other means'.[2] On the contrary, the court doubted whether 'any person blessed with normal understanding could fail to gather that the article meant that Her Majesty's High Court Judges had been drawn into the so called alliance [between 'the imperialist forces' and various 'shady characters in the N.C.N.C.' including Mr Sangster][3] to such an extent that Mr Sangster was on such footing with the judges that he was able to know beforehand what decisions a learned Judge was to give'.[4]

The court had no doubt that the passage in question was 'to use the words of Wilmot, J., "designed to excite in the minds of the people

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1. Ibid.

2. Ibid.

3. Ibid. This was the first allegation contained in the article which then - warming to its theme - proceeded to make the further allegations which were specifically in issue.

4. Ibid.

a great dissatisfaction with all judicial determinations"' and that it thus constituted '"the most fatal and dangerous obstruction to justice, ... [calling for] rapid and immediate redress"'.[1]

The court accordingly further rejected the further defence submission that where '"a case [is not] beyond reasonable doubt, the Courts will and ought "to leave the Attorney-General to proceed by criminal information"'.[2] This principle could not apply to the passage in question. The court could not 'accept the suggestion that such words were published for the public good'.[3] In its view, 'they decidedly had the reverse effect because their result could only be to destroy the confidence of the public in the Courts and this [was] the greatest disservice that [could] be done to the public'.[4] It followed that 'the duty of th[e] Court '[was] to deal brevi manu with the offender'.[5]

The court then turned to consider the concluding part of the offending passage, to the effect that Mr Sangster had been 'intimidating witnesses' and 'making free use of the Judge's alleged mandate in a most scandalous and high-handed manner'.[6] This, in the court's opinion, 'appear[ed]

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1. Ibid., at p. 232. This famous dictum of Wilmot, J. (contained in the judgment which he prepared in R v Almon) has previously been described in full at p. 902. The court adopted this passage because - though written very many years ago - its words were both eloquent and seemed aptly to describe the likely effect of the offending article.

2. Ibid., p. 232, based upon the authority of R v Gray [1900] 2 Q.B. 32 at 40.

3. Ibid.

4. Ibid.

5. Ibid. It is arguable that this portion of the judgment is no longer good law, in the light of Deduwa v The State, [1975] 1 All N.L.R. 1, discussed at p 725 above. The correct interpretation of the Supreme Court judgment in Deduwa is a matter of some difficulty (as further discussed at p.726 above) but it does at least seem clear that in cases of contempt not in the face of the court - as here - the summary procedure may only be used if the facts are so notorious

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[prima facie] calculated to obstruct or interfere with the due course of justice'[1] in those proceedings; but (as the court did not know what particular case was referred to) it considered that 'it would be fairer and safer not to make [a] definite pronouncement that [the sentence] constitute[d] a ... contempt of court'.[2]

In conclusion, the court emphasised that the earlier part of the passage was 'a most mischievous and wicked contempt'[3] which 'aim[ed][4] at destroying the very foundations [of the] judicial system'.[5] No apology or regret had been expressed; and the court accordingly considered it appropriate to impose a fine of £150 upon Service Press Ltd (plus costs of 25 guineas').[6]

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as to be virtually incontestible; and then only provided all constitutional safeguards of fair trial are observed.

It must, of course, also be remembered in this regard that the present case was decided before the incorporation of the quarantees of fundamental rights: so that it is not inappropriate that it should indeed have been affected thereby.

6. Ibid.

1. Ibid.

2. Ibid., p. 233.

3. Ibid.

4. Ibid. It would seem, however, that the court did not consider intention of particular importance. This emerges particularly clearly from its statement (at p. 233) that 'Lack of intent does not render a contempt innocuous'. This was in relation to the alleged contempt of prejudicing pending proceedings, which is generally regarded as an offence of 'strict liability' - not dependent on mens rea, as discussed at p. 953. The remark was also obiter, so it is difficult to know how much significance to attach to it.

5. Ibid.

6. Ibid. The court further warned, however, that 'such lenient treatment would not be repeated' and regretted that '[t]he contemnor being a limited Company, [it] could not have recourse to imprisonment'.

Another important decision involving a publication 'scandalising' the court is that of R v Onweugbuna and another.[1] The proceedings arose out of the publication in the Eastern Sentinel of 8 March 1957 of an article headed: '"ACTION GROUP SECRET DOCUMENT TRAPPED. PLANS AGAINST ZIK AND N.C.N.C. OUT. ANNIHILATION OF Z.N.V. SCHEMED"'.[2] It stated that a '"secret document"' (being a highly confidential letter written by an organiser within the Action Group to a leader of the party) had been '"captured"' in Aba by a political group known as the Zikist National Vanguard; and it claimed that this letter '"revealed plans the Action Group, with the help of certain persons in high office, [was] making ... to see to the defeat of Zik and the N.C.N.C. in the forthcoming Eastern elections, and the political annihilation of the Zikist National Vanguard"'.[3] The letter (which was reproduced in full) pointed to the advantages of destroying the latter political group and opined that Aba township was its '"pivot"'.[4] It proceeded:

> '"If we can destroy them from there [ie, Aba] the party will die a natural death. Incidentally, I have connected Mr M and he has promised to give them maximum punishment. In this regard please contact S.S. whom I am sure will set his men over them and nab them"'.[5]

In proceedings for contempt brought by the Attorney-General of the Eastern Region against the editor and Associated Newspapers of Nigeria Ltd (the printers and publishers of the newspaper), the court had little hesitation in concluding that the inference from the article was that Mr. M was one of the 'persons in high places' whose assistance had been

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1. [1958] 2 E.N.L.R. 17, reproduced by Fawehinmi, op.cit., pp.243-248.
2. See Fawehinmi, ibid., p. 244.
3. Ibid.
4. Ibid.
5. Ibid.

sought by the Action Group in order to destroy their political rivals. It was also quite clear from the terms of the letter that Mr. M was a person 'holding judicial office in Aba';[1] and the ordinary reader would undoubtedly suppose that 'reference was being made either to the judge [whose name began with M][2] or to one of the two Magistrates in Aba'.[3] The court continued:

> 'Now to say of a judge, or of a magistrate, that he has discussed with a political agent of a particular political party how he will deal with members of another political party if and when they are brought before him upon criminal charges, and to say that he has promised in advance to deal out the maximum punishment, is quite plainly to make a most appalling accusation. More than that, such a statement is perfectly calculated to shake the confidence of the public in the administration of justice, and to bring not only the person impugned into contempt, but also the Court over which such person presides'.[4]

The court approved the statement of Lord Russell, C.J. in R v Gray[5] that '[a]ny act done or writing published calculated to ... lower [the] authority [of a judge] is a contempt of Court'[6] and further cited

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1. Ibid., p. 245.

2. Ibid., p. 246. The court did not think it important that 'readers [might] be baffled in their choice of courts, some thinking that the judge was meant, others thinking that one of the Magistrates was meant.... [for] once it is realised that it is not the offended dignity of a particular court, or of the persons who compose it, which is the subject of punishment, but the wrong done to the public in weakening the power of the courts to do justice and in sapping the belief of men in the impartiality of the courts which administer justice, it will be seen that it matters not at all that there is uncertainty as to which court is impugned, so it be certain that a court is impugned'.

   The court also considered that, since the Judge at Aba was the only one in the Region whose name began with M., 'a considerable section of the reading public would suppose that reference to the Judge in Aba was made'.

3. Ibid., at 245.

4. Ibid.

5. [1900] 2 Q.B. 36 discussed further at p. 905.

6. Ibid., at 40.

a number of passages from the judgment of Wills, J. in R v Davies[1] which emphasise that - in the context of contempt through scandalising the court - '"the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone"'.[2]

The court was at pains to emphasise, however, that the rule against 'scandalising' the court does not preclude 'reasoned and respectful criticism by the press and by private persons'.[3] In the court's view, '[e]ven ill-informed or wrong-headed criticism of a judicial decision is not ... a contempt so it be honestly and respectfully made'.[4] This could not, however, assist the accused; for 'a statement to the effect that this or that Judge or Magistrate ha[d] come to an infamous arrangement with a politician of the sort suggested in th[e] article, [was] not criticism of the kind just mentioned, [but] ... [was] quite clearly a statement ... calculated to bring about just that mischief to which Wills, J. [had] referred'.[5]

Having rejected a number of other arguments raised by the defence,[6] the court found the accused guilty of contempt and imposed a fine of

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1. [1906] 1 K.B. 32.

2. Ibid.

3. Fawehinmi, supra, p. 245.

4. Ibid., p. 245.

5. Ibid.

6. These were that s 133 provided the sole method by which contempt could be punished in Nigeria (discussed at p. 703 ); that Associated Newspapers of Nigeria Ltd., being a corporation, could not be guilty of contempt as it was incapable of having the necessary 'guilty mind' (discussed at p. 963 ); and that contempt can only be committed in relation to particular proceedings (discussed at p. 904 ). The principal other defence relied upon was that the editor had acted in good faith and in the public interest; and this aspect of the case is considered further below.

£75 (plus £10.10s0d costs) on the editor and a fine of £150 (plus the same sum in costs) upon Associated Newspapers of Nigeria Ltd.

The decision - apart from its welcome acknowledgement that honest, reasoned and respectful criticism does not amount to 'scandalising' the court[1] - is profoundly disturbing . It was in the highest public interest that these secret plans of the N.C.N.C. should have been revealed; and it is most perturbing that the editor and publisher of the newspaper should have been thus penalised for so doing. The decision accordingly reveals a number of shortcomings in the present law: and these are further analysed in due course.

There appear to be no further reported Nigerian decisions involving imputations of judicial bias published by the media. There are, however, a number of cases dealing with allegations of partiality made by parties to proceedings or their counsel. Certain of these decisions have previously been adverted to in the context of the principles governing the exercise of the summary contempt jurisdiction;[2] and, for present purposes, it is instructive merely to note the nature of the allegations which have been found prima facie[3] to scandalise the court.

Thus, in Attorney-General of Western Nigeria v Oredein and others, in re Odumuyiwa,[4] a party to certain proceedings before Mr Justice Oyemade applied for the hearing to be transferred to another court on the grounds of the political bias of the judge in question, who was alleged to have

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1. See p.924 above. The legality of reasoned criticism is discussed further at p.937 below.

2. See p. 719, et seq.

3. It will be recalled from the discussion above that conviction for contempt was set aside on appeal in certain of these cases on the grounds, inter alia, of failure to observe "due process".

4. Unreported, Charge No. J/19C/65, reproduced by Fawehinmi, op.cit., pp. 131-135 .

expressed the determination on several occasions to acquit any person who killed a member of the N.N.D.P. and who appeared before him on a criminal charge'.[1] On the hearing of the application for transfer, Mr Justice Oyemade found the applicants[2] guilty of contempt and sentenced them to six months' imprisonment.[3]

In Deduwa and others v The State,[4] proceedings for contempt arose, once again, out of an application (contained in a letter to the Registrar at Warri) for certain proceedings to be transferred to another court. The grounds for this were said by the appellants (in their letter to the Registrar) to be the fact that the trial judge (Mr. Justice Atake) was an Itsekiri whereas the appellants (the defendants in civil proceedings pending before him) were Urhobos. The appellants further pointed out that the Itsekiri Communal Land Trustees were party to the proceedings and that all thirteen other defendants were also Itsekiris. The appellants (being mindful of the punishment for contempt recently imposed by the same judge on two other litigants who had similarly requested a transfer of proceedings) couched their application in humble, not to say obsequious, terms; but did nevertheless assert that they 'honestly believe[d] that there [was] a likelihood of bias on the part of the judge if he trie[d] the case'.[5]

On this letter being brought to the attention of Atake, J., he charged the applicants summarily with contempt, and - having conducted a rigorous

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1. See Fawehinmi, ibid., pp. 131-132.

2. The applicants' counsel was also convicted on the principle enunciated by the Privy Council in Vidyasagara v R, [1963] 2 W.L.R. 1033 (P.C.) See Fawehinmi, supra, p. 134.

3. Their counsel was sentenced to a fine of £25, or two months' imprisonment in default of payment.

4. [1975] 1 All N.L.R.1, reproduced by Fawehinmi, supra, pp. 170-179.

5. See Fawehinmi, op.cit., p. 170.

examination of them[1] - he indignantly refuted the suggestion that because a 'judge ... belongs to one tribe or the other ... [this] means that [he] lets himself (sic) to tribal considerations when adjudicating on a matter before him'.[2] He accordingly found the appellants guilty of contempt and sentenced each to a fine of ₦ 100, or six months' imprisonment with hard labour in default of payment.[3]

In Aniweta v The State,[4] counsel representing defendants in certain proceedings swore an affidavit alleging that the presiding judge - who had given judgment by default in his clients' favour - had subsequently altered his ruling to one in the plaintiffs' favour: having been bribed by the plaintiffs to do so. Counsel accordingly charged the judge in question (Mr Justice Obi-Okoye) with having 'grossly corrupted his office'.[5] When this affidavit (copies of which counsel was alleged to have distributed amongst the public in the vicinity of the Court) came to the attention of Obi-Okoye, J., he charged counsel summarily with contempt and (having explained the true circumstances behind the amendment of his judgment), sentenced him to 200 days' imprisonment for contempt.[6]

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1. They were given the choice of remaining silent, speaking from the dock or going into the witness box; and all three chose the last possibility. They were then closely cross-examined by Atake, J., in a manner which the Supreme Court subsequently expressly disapproved, as previously noted at p. 725.

2. Fawehinmi, supra, p. 175.

3. Their appeal against conviction succeeded, as previously noted, because of Atake, J.'s failure to observe constitutional guarantees of fair trial: especially the principle that an accused should not be compelled to give evidence against himself. See p. 726.

4. Appeal No. FCA/E/47/78, reproduced by Fawehinmi, supra, pp. 98-116.

5. See Fawehinmi, ibid., p. 99.

6. Conviction was upheld on appeal, but sentence reduced to 120 days' imprisonment as previously explained at p. 721.

By contrast, in Agbachom v The State,[1] the allegation (once more in support of an application for transfer of proceedings to another court) was that the trial judge had been paid (presumably by a party with an interest in the proceedings)[2] 'the sum of £488-15s being balance out of 700 guineas 'legal debt' ... out of trust fund'.[3] The judge in question took the view that this allegation would be understood as meaning that he had 'calandestinely while a judge collected the said sum ... and that [it was] not in fact a debt owed to him'.[4] He accordingly charged the applicant with contempt, tried and convicted him summarily the following day, and sentenced him to a fine of £75 or three months' imprisonment. On appeal, however, the Supreme Court ruled that the passage was ambiguous and that contempt had therefore not been proved beyond reasonable doubt, as required in criminal proceedings. It emphasised that 'reading the paragraph in a normal, natural and balanced way ... [i]t [merely] stated a fact, which [was] not disputed, that money due under a legal debt was paid to the learned trial judge'.[5] Accordingly, '[t]o impute immoral motives [on the applicant's part] as the learned trial judge [had done], [was] quite untenable';[6] and the conviction was accordingly set aside.

Leaving aside these Nigerian examples of the type of imputation of bias held to constitute contempt, and focusing again on allegations of judicial partiality published by the media, it is interesting to note the further

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1. [1970] 1 All N.L.R. 69, reproduced by Fawehinmi, op.cit., pp. 65-72.

2. This is not made clear in the report of the proceedings, but seems the only logical inference.

3. See Fawehinmi, supra, p. 65.

4. Ibid.

5. Ibid., p. 71.

6. Ibid.

guidance (as to the type of publication regarded as scandalising the court) provided by a number of English cases.

Of these, the most important is the case of New Stateman (Editor), ex parte D.P.P.[1] This arose out of libel proceedings,[2] brought by the editor of the Morning Post against Dr Marie Stopes, a strong advocate of birth control at a time (1928) when this was still a highly controversial question. Judgment had been given against her, and she had been ordered to pay damages of £200. The New Stateman thereupon published an article 'suggesting that Mr Justice Avory, who had presided over the action, had allowed his religious convictions as a Roman Catholic to prejudice his summing up'.[3] The article described the verdict in the libel proceedings as 'a substantial miscarriage of justice'; and - whilst disclaiming sympathy for Dr Stopes' work or aims - emphasised that 'prejudice against those aims ought not to be allowed to influence a Court of Justice in the manner in which they appeared to influence Mr Justice Avory in his summing up'. It concluded with the observation:

> 'The serious point in this case, however, is that an individual owning to such views as those of Dr Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr Justice Avory and there are so many Avory's.'[4]

In proceedings for contempt subsequently instituted against the publisher, Lord Hewart, C.J. 'had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the

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1. (1928), 44 T.L.R. 301.
2. This was in Gwynne v Stopes. See Borrie & Lowe, op.cit., p. 161, n 12.
3. Miller, op.cit., p. 186.
4. New Statesman (Editor), ex parte D.P.P., supra, at 301.

performance of his judicial duties'.[1]

Then, in 1930, in R v Wilkinson,[2] the Daily Worker published an article strongly criticising the sentences imposed by the courts on 'serving soldiers who committed crimes to get out of the army'.[3] It alleged that these reflected the 'violent oppression of the working classes which [was] rapidly becoming the hall-mark of the policy of the Labour Government'.[4] It continued: 'Rigby Swift, the Judge who sentenced Comrade Thomas, was the bewigged puppet and former Tory M.P. chosen to put Communist leaders away in 1926. The defending counsel, able as he was, could not do much in the face of strong class bias of the Judge and jury'.[5]

This was described by Lord Hewart, C.J. as a 'gross and outrageous contempt'[6] which 'had the effect of bringing the judge into contempt and lowering his authority'.[7]

In 1931, in R v Colsey,[8] the editor of the magazine Truth was found guilty of contempt for publishing the following facetious comment:

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1. Ibid., at 303.
2. The Times, 16 July, 1930.
3. Arlidge & Eady, op.cit., p. 161.
4. The Times, supra.
5. Ibid.
6. Miller, op.cit., p. 186.
7. Borrie and Lowe, op.cit., p. 156.
8. The Times, 9 May 1931.

> 'Lord Justice Slesser who can hardly be altogether unbiased about legislation of this type maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears'.
> [1]

Underlying the reference to Lord Justice Slesser's alleged bias was the fact that he himself had steered the legislation in question through Parliament at a time (1924) when he had been Solicitor-General in the government of the day. The case was heard by Lord Hewart, C.J., who - again - had little hesitation in concluding that it constituted a contempt.

The decision in R v Colsey has been much criticised[2] and seems to represent the high-water mark in the tide of judicial sensitivity in England. It is the last reported decision in England in which imputations of bias on the part of judges have been held to constitute contempt. The reason for this may, of course, be that publications of this kind have ceased, the media having learned the need for greater caution. The more probable explanation, however, especially in the light of the increased tolerance of strong language in English society in general, is that the judiciary has become less "touchy" and more able to acknowledge the legitimacy of criticism.[3]

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1. Ibid.

2. See Borrie & Lowe, op.cit., p. 156. In the words of Professor Goodhart, it 'carr[ied] the doctrine of constructive contempt to its extreme limits for the administration of justice can hardly have been seriously endangered by the Editor's mild but expensive humour'. See Goodhart, 'Newspapers and Contempt of Court', (1934-35) 48 H.L.R. pp 885-910, p 904.

3. This may, of course, be too sanguine a view, for it must also be acknowledged - as stated by Miller, op.cit., p. 187, - that 'it is known that the news media [in England] have been troubled in recent years by the possibility of committing a contempt by reporting (and thus publicising) accusations of political bias levelled by certain trade-union leaders and others at the National Industrial Relations Court'.

Similar increased tolerance is not, however, to be espied in other Commonwealth jurisdictions. Mention is again briefly made of some of the more glaring examples of judicial over-reaction to suggestions of bias - for the purpose, once more, of pointing the direction which (it is submitted) the Nigerian judiciary should not - in future - take.

A notable example of recent judicial hypersensitivity is provided by the case of Chokolingo v Attorney-General of Trinidad and Tobago.[1] Here, the editor and publisher of a newspaper called 'The Bomb' were convicted of scandalising the court for publishing a fictitious short story which ' purported to be an account by a servant recently dismissed from a judge's household of the way in which the judge and his wife and, it was suggested, his fellow judges habitually conducted themselves'.[2] It alleged 'bribery, corruption and fraud in the household';[3] and the local Law Society was so incensed that it immediately instituted proceedings for contempt. Both defendants pleaded guilty[4] before the High Court and were sentenced to 21 days' imprisonment and a fine of $500 respectively.

In the New Zealand case of Attorney-General v Blundell,[5] a newspaper reported a speech made by the President of the New Zealand Labour Party; and quoted him as saying (inter alia) that "he had never known the Supreme Court to give a decision in favour of the workers where it could possibly avoid it" and that "he agreed that they [the workers]

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1. [1981] 1 All E.R. 244 (P.C.). The case has, of course, previously been examined in greater detail in the section on contempt of court in general, at p 745 et seq.

2. Ibid., at 245.

3. Ibid., at 246.

4. Unfortunately, the report of the proceedings gives little indication of whether the result would have been different if the defendants had not acknowledged their guilt in this way.

5. [1942] N.Z.L.R. 287.

would not get fair play from the Court of Arbitration".[1] Myers, C.J. held that these passages constituted contempt, being 'calculated to depreciate the authority of both the Supreme Court and the Court of Arbitration ... [and] to diminish the confidence of the public in the courts'.[2] Whether the article would have had such drastic consequences in reality seems open to considerable doubt.

In the early Australian case of Re Syme, ex parte Daily Telegraph Newspaper Co. Ltd.,[3] the following passage was held to constitute contempt:

> "Taking all three decisions together, we fear there is only one conclusion the public will come to and that is that the political bias of the Judge was not without an influence, consciously or unconsciously upon his decision".[4]

However, the decision does not provide clear authority in this context, for the ground on which the article was held contemptuous was that it tended to prejudice pending proceedings (rather than that 'it impugned the judge's impartiality').[5]

In another Australian case, Re the Evening News,[6] a newspaper of that name had published an article accusing a particular judge of bias. The underlying circumstances were that the newspaper had been involved in three libel cases (presumably decided by the judge in question) which it had lost; and had then published (in relation to a fourth case)

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1. Ibid., (cited by Borrie & Lowe, op.cit., p. 163).
2. Ibid.
3. (1879), 5 V.L.R. L. 291.
4. Ibid., (cited by Borrie & Lowe, op.cit., p. 162).
5. Borrie & Lowe, op.cit., p. 162.
6. (1880), 1 L.R. (N.S.W.) 211.

an article which contained the following offending passages:

> "His Honor the Judge Windeyer has had another opportunity to show his utter want of judicial impartiality and from the bench he has delivered once more a bitter and one-sided advocate's speech....
>
> Fortunately the gentlemen of the jury ... were men of some independence of character and they decided the case on its merit awarding comparatively small damages"'. 1

It was held that the article constituted a contempt.

In fairness to the Australian judiciary (and as evidence of an encouraging liberalisation of attitude which other Commonwealth jurisdictions would do well to emulate), it must also be pointed out that the two decisions described above both date from before the turn of the century; and that more recent Australian precedent reveals a far more robust attitude to allegations of partiality. The case in which this seems particularly evident is Attorney-General for New South Wales v Mundey.[2]

Here, the president of a trade union, who had caused damage to the goal posts on a rugby field in the course of protesting against a "Springbok" rugby tour of Australia, was fined for this and bound over at Sydney quarter sessions. At the conclusion of his trial, the secretary of the same union was asked for his impression of the decision and replied:

> 'Well, I think it's a miscarriage of justice.... it showed that the judge himself was a racist judge. It shows you the extent to which racism exists within our society and it shows you what a tremendous problem we have, all Australians, to overcome this deeply ingrained racism....

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1. Ibid. (cited by Borrie & Lowe, supra).

2. [1972] 2 N.S.W.L.R. 887 (N.S.W. Sup Ct).

> I think the main purpose, the industrial action by the workers here this morning, the spontaneous action of workers walking off jobs, stopped the racist judge from sending these two[1] men to jail; that's the real position'.

This statement was broadcast, in edited form, by at least one television station as part of its evening news programme.

In proceedings for contempt, it was held by Hope, J.A. that the contempt of scandalising the court had indeed been committed. The grounds for this decision are, however, significant. It was not the allegation that the judge was racially biased which constituted contempt, but 'the suggestion that [he] had been overawed by the action of the workers [in] congregating in the vicinity of the courtand that it was this alone which had caused him to refrain from imposing a prison sentence'.[2] As stated by Miller, 'Hope, J.A.'s refusal to accept that the allegation that the judge was a 'racist judge' was itself a contempt in the circumstances of the case shows a robust and commendable attitude to this branch of the law of contempt'.[3]

Whether public confidence in the judiciary is so tenuous as to be undermined by the suggestion that a judge has been swayed by the actions of protesters is, however, a moot question - and suggests that Australian courts still have some distance to go in overcoming hyper-sensitivity.[4]

Canadian decisions also reveal a high degree of judicial sensitivity.

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1. Both the president and another man had been so fined and bound over.

2. Miller, op.cit., p. 187.

3. Ibid.

4. In this regard, however, the robust judgment of Griffith, C.J. in another Australian case, R v Nicholls, (1911) 12 C.L.R. 280, acknowledging that criticism may be for the public benefit, should not be overlooked. This is discussed further at p.944 below.

Thus, in R v Murphy[1] an article was published in a university newspaper which described the author's personal experience in particular proceedings and charged the court with having provided 'a mockery of justice'. It alleged that the author 'along with any of the other defence witnesses, might well have testified to the bottle-throwing mob that on several occasions gathered outside'; and concluded as follows:

> 'The Courts in New Brunswick are simply the instruments of the corporate elite. Their duty is not so much to make just decisions as to make right decisions (i.e. decisions which will furthe perpetuate the elite which controls and rewards them). Court appointments are political appointments. Only the naive would reject the notion that an individual becomes a justice or judge after he proves his worth to the establishment'.[2]

The New Brunswick Supreme Court held that the article constituted a contempt: a decision which seems difficult to endorse, especially in the light of the limited circulation of the newspaper: and one which must, if anything, have tended to 'alienate [the] students even further, and to reinforce the views which prompted the publication'.[3]

In the case of Re Borowski,[4] the Minister of Transport in one of the Provinces[5] suggested in the course of an interview (which was taped and subsequently broadcast over the radio) that a recent decision of a local magistrate had been influenced by the fact that he (the magistrate) was 'a loyal Conservative and had been appointed by the

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1. (1969), 4 D.L.R. (3d) 289 (S.C.).
2. Ibid , at 291.
3. Miller, op.cit., p. 188.
4. (1971) 19 D.L.R. (3d) 537 (Manitoba Q.B.).
5. Manitoba.

Conservative Administration'.[1] He was found guilty of contempt.

These and other Canadian decisions have elicited the observation that '[c]ontempts of this nature are viewed with considerable disfavour by the Canadian judiciary' and that the judges have evidenced 'extreme sensitivity' on occasion.[2] It is submitted that the same may be said for other Commonwealth jurisdictions (as illustrated by the brief survey above) and that the Nigerian judiciary - in this context as well[3] - should steadfastly refuse to follow their example.

## 10.6. The Legality of Reasoned Criticism[4]

By contrast with the two categories of publication considered above, those which do no more than to offer temperate and reasoned criticism of judges and their decisions clearly do not constitute contempt. On the contrary, such publications fulfil a valuable function in society by preventing the abuse of judicial authority and by contributing to the growth and development of the law to fit the changing needs of modern times. Accordingly, they play a vital role in preserving and maintaining public confidence in the administration of justice in general.

A number of judicial dicta provide authority for the legality of reasoned criticism: but the most telling statement is perhaps that of

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1. The Minister's actual words, in seeking to explain the decision, were: 'The fact that he is a loyal Conservative and had been appointed by the Conservative Administration can't be overlooked'. The Minister had also said: '[I]f that bastard hears the case I will see to it that he is defrocked and debarred'. As stated by Miller, op.cit., p. 187, '[T]his latter threat was regarded by Nitikiman, J. as being 'unbelievably outrageous' in that it suggested to listeners that the judiciary was subject to dismissal at the pleasure of the executive'. It is difficult to determine, accordingly, to what extent the court's conclusion (that the Minister was guilty of contempt) was based upon his allegation of judicial partiality - and to what extent it was in reaction to the latter 'outrage'.

2. Martin, op.cit., p. 16.

3. It has already been suggested, at p. 912 above, that the Nigerian

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Lord Atkin in Ambard v Attorney-General for Trinidad and Tobago[1], as follows:

> 'But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune.[2] Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men'.[3]

Also worthy of note is the assertion of Lord Russell, C.J., in R v Gray[4] that:

> 'Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object, is published....'.[5]

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Continued
judiciary should not follow Commonwealth precedents relating to scurrilous abuse (of the kind described in the text at that and the preceding pages).

4. This heading - which seems particularly apt - is derived from Miller, op.cit., p. 188.

1. [1936] A.C. 322 (P.C.).

2. The caveat expressed by his Lordship in relation to 'imputing improper motives' raises a query as to whether 'reasoned criticism' in the form of an allegation of judicial bias may be considered lawful, within the bounds of this passage. This point is discussed further at p.944 et seq.

3. Ambard v Attorney General for Trinidad and Tobago, supra, at 335.

4. [1900] 2 Q.B. 36.

5. Ibid., at 40.

More recent, and even stronger, authority is to be found in the case of Metropolitan Police Commissioner, ex parte Blackburn (No.2)[1] where Lord Denning, M.R. affirmed:

> 'We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication'.
> [2]

In the same case, Salmon, L.R. emphasised:

> 'It follows that no criticism, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith'.
> [3]

It is noteworthy that the Nigerian courts have also emphasised on a number of occasions that reasoned criticism does not constitute contempt. Thus, in Agbachom v The State,[4] the Supreme Court stressed, echoing the dictum of Lord Atkin in Ambard v Attorney-General for Trinidad and

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1. [1968] 2 Q.B. 150.
2. Ibid., at 155.
3. Ibid.
4. [1970] 1 All N.L.R. 69, reproduced by Fawehinmi, op.cit., pp. 65-72.

Tobago,[1] that 'justice is not a cloistered virtue';[2] and that bona fide criticism is legitimate.[3] Likewise, in R v Onweugbuna and another,[4] the court was at pains to point out that the rule against scandalising the court does not preclude 'reasoned and respectful criticism by the press and by private persons'.[5] It therefore emphasised that '[e]ven ill-informed or wrong-headed criticism of a judicial decision is not . .. a contempt so it be honestly and respectfully made'.[6] Further, in Aniweta v The State,[7] the Federal Court of Appeal affirmed that 'genuine criticism'[8] does not amount to contempt.

The common thread running through all these dicta is that criticism is legitimate provided it is reasonable, temperate and proffered in good faith in constructive - rather than destructive - spirit. The distinguishing criterion is perhaps best identified in Re Evening News[9], where Sir James Martin, C.J. emphasised that:

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1. [1936] A.C. 322 (P.C.).
2. Ibid., at 335.
3. See Fawelinmi, supra, p. 70.
4. [1958] 2 E.N.L.R. 17, reproduced by Fawehinmi, op.cit., pp. 243-248.
5. See Fawehinimi, ibid., p. 245.
6. Ibid.
7. Appeal No FCA/E/47/78, reproduced by Fawehinmi, op.cit., pp. 98-116.
8. See Fawehinmi, ibid., p. 113; and see also p. 111.
9. (1880) 1 L.R. (N.S.W.) 211.

> '[Whilst] no immunity [may be claimed] from fair, even though it may be mistaken criticism ... there is a limit beyond which criticism ceases to be fair, and mistakes become pernicious; and there are modes of comment which show a desire to vilify rather than an attempt to correct'.[1]

The words underlined suggest a sound theoretical basis for distinguishing legitimate criticism from that which goes too far. The test also explains (in theory at least) why scurrilous abuse and imputations of bias constitute contempt: for it seems reasonable to assume that both[2] are prompted more by the wish to vilify than to correct. However, whilst the theoretical principle may appear clear, application of a theoretical model to practical reality is never easy - as the following cases serve to illustrate.

In R v Metropolitan Police Commissioner, ex parte Blackburn (No 2),[3] the facts involved the publication in Punch magazine of an article, written by Mr Quintin Hogg, Q.C., M.P., which criticised the interpretation placed upon gaming legislation by the courts - specially the Court of Appeal - and alleged that this had rendered the statutes unworkable in practice. The salient part of the article read as follows:

> 'The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judgments. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous decisions of the Courts including the Court of Appeal. So

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1. Ibid., emphasis supplied.

2. The matter is not so clear in the case of allegations of partiality, which may well be prompted by the desire to correct. Once more, therefore, imputations of bias call for further and more detailed consideration. See p. 944 et seq.

3. [1968] 2 Q.B. 150.

> what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it ... [They] blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts....'.
> [1]

A private prosecution for contempt was instituted; but the Court of Appeal had little difficulty in concluding that the article was not a contempt. Its comments were outspoken, but they were proffered in good faith and (adopting the test of Re the Evening News[2]) there was nothing to indicate that their purpose was vilification of the courts rather than an attempt to persuade them to "mend their ways" and to take heed of 'the golden rule for judges in the matter of obiter dicta [that] [s]ilence is always an option'.[3]

In Aniweta v The State,[4] decided by the Federal Court of Appeal in Nigeria in 1978, the appellant had alleged that a particular judge had 'grossly corrupted his office' by accepting a bribe of ₦2000 in return for reversing a judgment he had given. His conviction for contempt was upheld by the appellate court (which did, however, reduce his sentence somewhat[5]) on the ground that the allegation was the 'most gruesome insult that ha[d] ever been directed personally against a Judge in the history of th[e] country';[6] and that it stood in a totally different category from

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1. Ibid., at 154.

2. (1880) 1 L.R. (N.S.W.) 211, discussed above.

3. R v Metropolitan Police Commissioner, ex parte Blackburn, (No.2), supra.

4. Appeal No FCA/E/47/78, reproduced by Fawehinmi, op.cit., pp. 98-116.

5. His sentence was reduced from 200 days' imprisonment to 120. This was on the basis that the contempt power is to be exercised as sparingly as possible, and that the sentence imposed at trial was 'severe in the extreme': Fawehinmi, ibid., p. 108.

6. Ibid., p. 111.

'genuine criticism',[1] which - so the court took pains to stress - did not constitute contempt.

Likewise, in Attorney-General of Western Nigeria v Oredein and others, in re Odumuyiwa,[2] the allegation that a judge had expressed his determination to acquit any person who killed a member of a particular political party was held contemptuous, there being no question of this constituting no more than 'genuine criticism'. Similarly, allegations that a judge has undertaken to impose particularly severe penalties on political opponents;[3] or has been motivated by ethnic partisanship,[4] have been held prima facie to scandalise the court, going far beyond the bounds of reasoned and constructive criticism.

While it may perhaps be accepted that the allegation in the Blackburn[5] case described above was an example of criticism offered in constructive spirit, whilst the Nigerian cases above - by contrast - evidence criticism motivated more by the desire to vilify than to correct, there are a number of other decisions in which this yardstick appears to offer no guidance at all. Thus, for example, in the New Brunswick[6] case involving allegations of judicial bias published in a student newspaper, to assert that publication was motivated by either desire seems somewhat strained. Moreover, other decisions present even more intractable problems in the

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1. Ibid., p. 113. See also p. 111, where Douglas, J.C.A. cites the dicta reproduced from Ambard v Attorney General for Trinidad and Tobago, supra, and R v Metropolitan Commissioner, ex parte Blackburn (No.2), supra.

2. Unreported, Charge No J/19C/65, reproduced by Fawehinmi, op.cit., pp.131-135.

3. See R v Onweugbuna and another, [1958] 2 E.N.L.R. 17, discussed at p 922.

4. See Deduwa and Others v The State, [1975] 1 All N.L.R. 1, discussed at p. 926.

5. R v Metropolitan Police Commissioner, ex parte Blackburn, (No.2), supra.

6. R v Murphy, (1969) 4 D.L.R. (3d) 289, discussed at p. 936.

attempted application of this criterion: for they seem clearly to evidence criticism proffered in order to correct; and yet have been held to constitute contempt. These cases[1] are discussed further below; but, before proceeding to examine them, it is salutary to note a very different approach to criticism (even in the form of imputation of judicial bias) taken by an Australian court in the early twentieth century and recently expressly approved by a commission of inquiry in the United Kingdom.

This is the case of R v Nicholls,[2] in which Griffith, C.J. expressed the following important dictum, now approved by the Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry:[3]

> 'I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such a character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be before it, any public comment on such an utterance, if it were fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel'.
> [4]

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1. These cases are Ambard v Attorney-General for Trinidad and Tobago, [1936] A.C. 322 (P.C.) and S v Van Niekerk, [1970] 3 SA 655 (T)

2. (1911) 12 C.L.R. 280.

3. Cmnd. 4078, 1969, para 36.

4. Ibid., at 286. The further question of whether a defence of 'fair comment' applies in the context of contempt is discussed further at p.973 below.

It is submitted that this acknowledgement by Griffith, C.J. that reasoned, temperate and bona fide allegations of judicial bias may indeed serve the public good is valid and sound: and that it points the direction which Nigerian law should take. This suggestion has particular practical significance for - although no empirical study of this question appears to have been conducted - it seems fair to conclude from the brief sample of cases described above that the offence of scandalising the court most commonly takes the form of an imputation of judicial bias. Hence, the refusal to acknowledge the legality of reasoned criticism in this form imposes a restriction on freedom of expression which cuts especially deep. Moreover, it is also important - in the longer term interests of society - that the prevailing myth that judges stand serene, objective and impartial above the forces that beset more ordinary mortals, and untainted by the influences of education and upbringing should be exposed; and that the general public should appreciate that those to whom the process of dispute-resolution has been entrusted are not infallible. Only through allowing reasoned criticism in the form of imputations of judicial bias can the public be informed of the extent to which conscious and unconscious preferences and predelictions influence judicial decision: and only in this way can the judges themselves take measure of their human deficiencies and attempt to guard against them.

This is not, however, to decry the importance of the manner in which such imputations are made. Wild, heated and unsubstantiated allegations of judicial bias can serve no constructive purpose. But if the imputation is temperate and reasoned and proffered in good faith, it should not be held to constitute contempt of court.[1]

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1. It is submitted that this approach is to be preferred to that of imposing a blanket rule that all imputations of bias constitute contempt, subject to defences such as 'justification' and 'fair comment', which are further discussed in due course.

Two controversial decisions may serve to illustrate the practical importance of the submission that - in appropriate circumstances - reasoned allegations of bias should be acknowledged as 'lawful criticism'. These are the cases of Ambard v Attorney General for Trinidad and Tobago[1] and S v Van Niekerk.[2]

In Ambard's case, the appellant was the editor and part-proprietor of a newspaper called the Port of Spain Gazette. Following the passing of sentence (in quick succession) in two cases of attempted murder, he published an article, headed 'The Human Element', in which he criticised the comparitive severity and leniency of the sentences imposed.[3] The article stressed that its purpose was not to 'confir[m] popular opinion as to the inherent severity or leniency of individual judges or magistrates', nor to allege that 'one judge [was] habitually severe [and] another ... habitually lenient'.[4] Instead, it sought to draw attention to a fact which 'must often have occurred to readers of the proceedings in [the Trinidad] criminal courts ... [viz.] how greatly the personal or human element seems to come into play in awarding punishment for offences'.[5] It concluded by submitting that:

> '[I]f some way could be devised for the greater equalisation of punishment with the crime committed, a great deal would have been achieved towards the removal of one frequent cause for criticism of

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1. [1936] A.C. 322 (P.C.).

2. [1970] 3 S.A. 655 (T).

3. In the first case, the accused (who had attempted to shoot his superior officer) was sentenced to eight years imprisonment. In the second, the accused - who had brutally razor-slashed a pregnant woman - was sentenced to seven years.

4. Ambard v Attorney General for Trinidad and Tobago, supra, at 331.

5. Ibid.

> the sentences passed in our various criminal courts'.[1]

The appellant was charged with contempt, for 'bring[ing] the authority and administration of the law into disrepute and disregard';[2] and was convicted by an 'unduly sensitive Supreme Court of Trinidad and Tobago'.[3] He appealed to the Judicial Committee of the Privy Council, which advised that the appeal should be allowed. Lord Atkin stressed (in the well-known passage reproduced at p. 938 above) that 'Justice is not a cloistered virtue'[4] and - whilst avoiding comment on whether 'the criticism of the sentences was [in fact] well founded'[5] - proceeded to acknowledge that:

> 'The writer is ... perfectly justified in pointing out what is obvious, that sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is quite inevitable. Some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency. If to say that the human element enters into the awarding of punishment be contempt of Court it is to be feared that few in or out of the profession would escape'.[6]

This opinion of the Judicial Committee stands in marked contrast with the second case in question: S v Van Niekerk, which - although a South African

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1. Ibid., at 333.
2. Ibid., at 334.
3. Miller, op.cit., p. 189.
4. Ambard v Attorney-General of Trinidad and Tobago, supra, at 355.
5. Ibid., at 336.
6. Ibid.

decision - is based on common law principles and is sufficiently important to merit some consideration. The accused was a senior lecturer in law at a South African university. He wrote an article, entitled 'Hanged by the neck until you are dead', which was published in the South African Law Journal. The article dealt with the question of capital punishment, and was based upon replies received by the accused to a questionnaire sent by him to advocates practising in South Africa and Rhodesia (as it then was). Two of the questions asked were as follows:

> 'Do you consider, for whatever reason, that a non-European tried on a capital charge stands a better chance of being sentenced to death than a European?'; and, if so,
>
> 'Do you think that the differentiation shown to the different races as regards the death penalty is conscious and deliberate?'[2]

Commenting upon the replies received to these questions, the accused wrote:

> 'Whatever conclusion one may draw from the results of these two questions the fact which emerges undeniably is that a considerable number of replying advocates, almost 50 per cent in fact, believe that justice as regards capital punishment is meted out on a differential basis to the different races, and that 41 per cent who so believe are also of the opinion that such differentiation is 'conscious and deliberate'".[3]

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1. [1970] (3) S.A. 655 (T). The South African law of contempt is also derived from English common law; and accordingly has persuasive authority in other common law jurisdictions.

2. Ibid., at 656. The replies received were as follows:
   (To Q.1.): Abolitionists, Yes 24; No 18; Only for certain crimes 22; Uncertain 6.
   Retentionists, Yes 10; No 46; Only for certain crimes 10; Uncertain 3.
   Doubtfuls, Yes 5; No 3; Only for certain crimes 7; Uncertain 3.
   (To Q.2.): Abolitionists, Yes 18; No 14; Uncertain 14.
   Retentionists, Yes 6; No 12; Uncertain 2.
   Doubtfuls, Yes 8; No 2; Uncertain 2.

3. Ibid., at 656.

He was charged with contempt of court.

In the resultant proceedings, Claassen, J. queried what the passage above would mean to its readers and came to the following conclusions:

> '[The words] could convey the idea that a large number of advocates believe that Judges in this country, and by implication all of them, do not mete out justice impartially as far as capital punishment is concerned, but they consciously and deliberately mete it out in a biased way and on a racial basis. It ... might [further] be concluded that the non-Europeans are consciously and deliberately discriminated against and that a non-European is more likely to receive the death sentence than a European.... [On that] interpretation ... the Judges could no longer be treated with due respect for they then could no longer be universally thought of as being impartial.... [This] could possibly have constituted a gross imputation against the honour and impartiality of the Judges'.
> [1]

It is gratifying to note both that Claassen, J. was not entirely sure that the article would constitute contempt;[2] and also that the accused was ultimately acquitted on the grounds that he lacked the requisite mens rea. The latter aspect of the judgment is discussed further below;[3] and for present purposes the most important facet of the decision is the possibility it reveals of criticism which is eminently reasoned, temperate and bona fide (even though it also involves imputations of partiality) being held to constitute contempt. The case is most disturbing, not only because the criticism was put forward in responsible and measured terms and was published in a scholarly journal (rather than in

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1. Ibid., at 658 - 659.

2. Note the use of the word 'possibly' in the passage cited. Claassen, J. went on to state in consequence, that, it 'might have been contempt of Court'; See 659, emphasis supplied.

3. See p. 955 below, in the section on Mens rea.

the popular press); but also - and especially - because there is a widespread belief in South Africa (in legal circles at least) that there is indeed a racial bias in the imposition of the death penalty. The result of the Van Niekerk proceedings, however, has been largely to muzzle the further voicing of such misgivings. Freedom of expression has suffered commensurately: and so too has the general administration of justice. In any society, especially one divided by racial or any other form of prejudice, the legal system can command the respect of all only if it accords equal treatment to all. If judicial bias precludes this, then judicial impartiality must somehow be secured: and the first step in the process is to expose what is being done, rather than to shroud it behind the myth of judicial objectivity.

Moreover, in addition to the particular difficulties posed by racial or ethnic prejudice, the public airing of allegations of judicial partiality may be important for other reasons - as the facts of these two cases further illustrate. Both provide examples of the difficulties and arbitrary element in imposing sentence; and both accordingly touch on a further question of fundamental importance in the administration of justice: the problem of developing an adequate and effective system of sentencing. Current debates on the function and purpose of punishment, and the appropriate margin of judicial discretion in sentencing, are still far from providing satisfactory solutions. Little progress can be made in this regard, however, whilst comment of the type in issue in both Ambard's and Van Niekerk's cases runs the risk of being held to constitute contempt.

In conclusion, it remains therefore to reiterate that there is a vital public interest in allowing imputations of bias to be made against

judges whenever circumstances so warrant: and to stress that - provided the criticism is reasoned and responsible - such allegations should not constitute contempt of court.

## 10.7. The Test of Liability for Scandalising the Court

The next important question for consideration is the test of liability for scandalising the court; and, particularly, the extent to which *mens rea* forms a constituent element of the offence. Assessment of the importance of *mens rea* raises two questions: first, as to whether *mens rea* is necessary for conviction at all; and, secondly, as to the type and extent of the intent (if any) that is required.

### 10.7.1. *Mens rea* as a constituent element of the offence at common law

The early case of *Almon*[1] is significant for its insistence that *mens rea* is indeed a constituent element of the crime of scandalising the court. Thus, Wilmot, J. emphasised, in his prepared judgment, that:

> 'It is the intention which, in all cases, constitutes the offence. "*Actus non facit reum, nisi mens sit rea*".... It would be a contradiction in terms to admit Courts to have cognizance of the offence, and yet not admit them to be the Judges of the only ingredient which makes it so'.[2]

However, Wilmot, J. - in making this declaration - was not principally concerned with the question whether *mens rea* is required for conviction. His objective was to counter the defence contention that

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1. (1765) Wilm. 243; 97 E.R. 94.

2. *Ibid*.

mens rea was an issue which had to be determined by a jury: rather than through the summary process which Wilmot, J. himself considered appropriate. It is accordingly difficult to determine how much weight can properly be attached to this seemingly clear statement of the importance of mens rea in the context of scandalising the court. The difficulty is compounded by the fact that, having disposed of the defence argument for trial by jury, Wilmot, J. made no further attempt to analyse or to define the nature of the mens rea apparently required.

The importance of mens rea has previously been discussed in the context of the sub judice rule. In this latter context it is clear (as now confirmed by s 1 of the Contempt of Court Act, 1981[1]) that mens rea is not a requirement; and that liability depends on whether a publication is objectively likely to prejudice fair trial, irrespective of the intention underlying its publication. It is submitted by Miller[2] that the same principle applies to contempt in the form of scandalising the court: so that it is the objective effect of, rather than the subjective motivation for, the publication which is the important factor. In his view, this conclusion is supported by the 'balance of authority';[3] and he cites as a particular example the case of New Statesman (Editor), ex parte D.P.P.[4] where 'Lord Hewart, C.J. seemingly accepted that the defendant publisher had not intended to interfere with the performance of Avory, J.'s judicial duties when imputing religious bias to him [but] did not [apparently consider] ... [that this] prevent[ed] liability from being imposed [on him], together with an order to pay the costs of the

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1. The significance of this provision in the context of scandalising court is further considered, at p. 956 below.

2. Op.cit., p. 191.

3. Miller, ibid.

4. (1928) 44 T.L.R. 301.

proceedings'.[1]

Recalling the facts of the various decisions described above, including R v Jackson[2] and R v Onweugbwa and another[3] as well as R v Gray,[4] R v Vidal,[5] R v Freeman,[6] R v Wilkinson[7] and R v Colsey[8] - and bearing in mind that the gravamen of the offence lies in interfering with the proper administration of justice through lowering public respect for the judiciary - it seems clear the intent to bring such consequence about has certainly not been considered a necessary condition for conviction in the past. The accused in each of these cases may indeed have had the intent to expose particular judicial shortcomings (though in Colsey's case even that may be doubted): but that is very different from an intent to undermine the administration of justice. Looking then to these authorities alone, (and leaving out of account the Commonwealth decisions previously described which, if anything, serve only to strengthen the inference); it seems plain that mens rea is not a constituent element of the offence at common law.

Some doubt as to this does, however, arise from the decision of the Privy Council in R v Perera.[9] The appellant here was a member of the

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1. Miller, supra.
2. (1925) 6 N.L.R. 49, discussed at p. 913 et seq.
3. [1958] 2 E.N.L.R. 17, discussed at p. 922 et seq.
4. [1900] 2 Q.B. 36, discussed at p. 905 et seq.
5. The Times, 14 October, 1922, discussed at p. 906.
6. The Times, 18 November, 1925, discussed at p. 907.
7. The Times, 16 July, 1930, discussed at p. 930.
8. The Times, 9 May 1931, discussed at p. 930 - 931.
9. [1951] A.C. 482 (P.C.).

House of Representatives in Ceylon and, as part of his public duties, made an inspection of a local prison, where he was given to understand that prisoners' appeals against conviction were frequently heard in their absence. Thinking this to be laid down by prison regulations, he recorded his criticism of it in the visitors' book in the following terms:

> 'The present practice of appeals of remand prisoners being heard in their absence is not healthy. When represented by Counsel or otherwise the prisoner should be present at the proceedings'.[1]

In fact, the practice (as to the nature of which the appellant was also mistaken) had originated in an order of the former Chief Justice: and the appellant was accordingly charged with, and convicted of, contempt.

On appeal to the Privy Council, the Board recommended that the appeal should be allowed. Unfortunately for present purposes, however, the Board based its decision upon a number of different grounds, including the fact that no publication had been effected;[2] that no direct reference had been made to the courts;[3] that the accused had been mistaken in believing that he was commenting on prison practice;[4] and that 'his criticism was honest criticism on a matter of public importance'.[5] The Board made no attempt to specify which ground it principally relied upon - nor did it deal expressly with the defence submission that

' There must be an element of malice in order to constitute a contempt

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1. Ibid., and at 487, where the full text of his entry is reproduced.

2. As stressed by Lord Radcliffe, ibid., at 488, the appellant had 'made no public use of [the information], contenting himself with entering his comment in the appropriate instrument, the visitors' book, and writing to the responsible Minister'.

3. Ibid., at 488.

4. Ibid.

5. Ibid.

of court'.[1] Accordingly, no clear principle as to the requirement of mens rea emerges from the judgment. However, one of the grounds undoubtedly relied upon by their Lordships was the fact that the appellant's criticism was 'honest' - meaning, presumably, that it was tendered in good faith - and that it concerned 'a matter of public importance'.[2] To this extent, at least, therefore, the decision does suggest that mens rea is indeed an important element in the offence.

Support for the proposition that mens rea is required for liability is also to be found in the case of S v Van Niekerk,[3] discussed above. Being a decision of South African origin, it is, of course, persuasive only in Nigeria: but it is nevertheless noteworthy for its emphatic affirmation of the need for mens rea. This was stated by Claassen, J. in the following terms:

> '...[B]efore a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the Judges in their judicial capacity into contempt or of casting suspicion on the administration of justice'.[4]

Turning to the type of intent (direct or indirect) required, and the manner of its proof, Claassen, J. proceeded to explain:

> 'For this type of intention it is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of Court and he was reckless

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1. Ibid., at 484.
2. See R v Perera, supra, at 488.
3. [1970] (3) S.A. 655(T), previously described at p.947 et seq.
4. Ibid., at 657.

> as to the result. This form of intention is known as dolus eventualis.... Subjective foresight, like any other factual issue, may be proved by inference. In a criminal case this inference must be the only one which can reasonably be drawn'.
>
> [1]

On the particular facts,[2] the accused was found to have lacked the requisite mens rea; and the charge against him was accordingly dismissed.

Notwithstanding the views expressed in Perera's and Van Niekerk's cases, however, the majority of decisions clearly support the proposition that mens rea is not an element of liability at common law.

The common law in the United Kingdom has been altered in this regard - so Arlidge and Eady[3] submit - by the introduction of the Contempt of Court Act 1981. This contention rests on a somewhat shaky

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1. Ibid., at 657.

2. The court accepted the accused's evidence that he had no intent to reflect improperly on the Judges or on the administration of justice. Its reasons for doing so included the fact that he was a credible witness, albeit 'talkative, inclined to be pompous and somewhat foolish': see 659; that he had been 'genuinely shocked' at the suggestion that his article constituted a contempt; and that he had thereupon taken 'all reasonable steps that were within his power to undo any adverse impression that might have been created'. These had included the insertion (in the second part of the article), of a disclaimer which emphasised, inter alia, that the courts do 'consciously endeavour to avoid [the] intrusion [of the racial factor]': See 660, emphasis supplied.

3. Op.cit., p. 163.

foundation;[1] but nevertheless serves to point the direction which Nigeria should now take to alleviate the harshness of the present strict liability principle. However, the mere assertion that mens rea should be acknowledged as a requirement for liability is not enough. Some consideration must also be given to the type and extent of intention required.

### 10.7.2. The type and extent of mens rea required for liability

Assessment of the type and extent of mens rea required for liability for the offence of scandalising the court raises two important questions. Is a direct or specific intent to interfere with the administration of justice required? Or is it sufficient that the accused must have appreciated the wider consequences of his conduct for the administration of justice, and was reckless as to whether these in fact resulted?[2]

The cases discussed above provide singularly little guidance on this question.[3] Some assistance may, however, be derived from a case involving contempt of a different nature - the persecution of a witness for giving evidence in particular proceedings. The decision in question

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1. The authors' contention is premised on the principle of statutory interpretation, expressio unius est exclusio alterius. They point out that s 1 of the new Act defines the strict liability rule with reference to particular proceedings (then active) and submit that this implies that the strict liability rule applies only in such circumstances; and hence no longer governs other forms of contempt (such as scandalising the court) which may be committed at any time and without reference to any particular litigation pending before the courts. However, it is equally plausible that s 1 was plainly designed to regulate only one especially troublesome aspect of strict liability in the law of contempt (viz that relating to sub judice publication, brought into sharp focus by the thalidomide proceedings previously described) and that the Act therefore made no attempt to modify

(continued)

is that of the Court of Appeal in Attorney-General v Butterworth.[1] Here an individual named Greenlees had given evidence before the Restrictive Trade Practices Court in proceedings involving a trade union of which he was a member. Other members of the union thereupon sought to have him dismissed from his honorary posts within the union; and those who, in doing so, had been 'motivated either predominantly or in part by a desire to punish him'[2] were held guilty of contempt. Some indication of the type of intent required for conviction is to be found in the following dictum of Donovan, L.J.:

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(Continued)

the strict liability rule as it applies in other contexts, such as scandalising the court.

2. In the latter type of situation, the accused may be said to have dolus eventualis (as described in S v Van Niekerk, see p. 956 above) or general intent. (The latter, in the words of Arlidge & Eady, requires 'a deliberate act committed with acknowledge of the relevant circumstances': See Arlidge & Eady, op.cit., at p. 80).

3. Except, of course, for S v Van Niekerk, which indicates that dolus eventualis or general intent is sufficient.

1. [1963] 1 Q.B. 696.

2. The judgment of Lord Denning, M.R. emphasises that, irrespective of R v Odhams Press Ltd., [1957] 1 Q.B. 73, 'the law requires a guilty mind in these cases of intimidation or victimisation of witnesses'. See Butterworth's case, supra, at 722. The remaining question is the kind of guilty mind required. Lord Denning, M.R.'s judgment unfortunately provides little further guidance on this point, simply emphasising that dismissal from the posts in question for reasons unconnected with the earlier proceedings (for example, for incompetence) clearly could not give rise to contempt. The underlying motivation to punish for having given testimony was therefore essential to liability - but his Lordship saw no reason to inquire into the precise balance of motivating factors at play (let alone to consider whether recklessness as to the further consequence of interference with the administration of justice was required). In his Lordship's view, it was sufficient if 'an actuating motive [which] influence[ed] the step taken' was that of punishment for giving evidence. See ibid., at 723.

> '[I]f the taking of such revenge was calculated to interfere with the administration of justice, then it will be no answer for the respondents to say that, while intending to punish Greenlees, still they had no intention of interfering with the administration of justice'.[1]

It thus appears[2] that - whilst some inquiry into intention was required in order to ascertain whether the motivation for the dismissal of the complainant was indeed to punish him for giving testimony in the earlier proceedings - further specific intent to interfere with the administration of justice was not necessary.

On the basis of this and other[3] authorities, Arlidge & Eady accordingly conclude that 'contempt of court is a crime of general intent ... [so that] a contemnor would be guilty:

(i) if he desired to interfere with the due process of justice; or

(ii) if he did not desire such interference but must have realised it was highly probable; or

(iii) if he neither desired it nor realised it was highly probably, but recognised it was a possibility and deliberately took the risk it might occur'.[4]

No guidance as to whether this analysis is correct can be gleaned from the new Act which (being concerned principally with strict liability) is silent as to the requirements of mens rea. It is submitted that -

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1. Ibid., at 726.

2. This is shown not only by the dictum cited here but by the general tenor of Donovan, L.J.'s judgment.

3. See Arlidge & Eady, op.cit., pp. 79-82.

4. Arlidge & Eady, ibid., p. 82. The authors also suggest that a contemnor could be guilty in a fourth situation - where he 'was heedless of a perfectly obvious risk'. It is submitted, however, that there is little practical difference between this and the second possibility, cited at (ii) above.

although the cases undoubtedly support the wide-sweeping principles above - it should instead be recognised, on policy grounds, that mens rea in the form of (i) above is needed (or, at the utmost, that (ii) may be sufficient).

The recommendations of the Phillimore Committee[1] in this regard are worthy of note. The Committee proposed inter alia that 'matter imputing improper or corrupt judicial conduct should only give rise to liability if published with the intention of impairing confidence in the administration of justice'.[2] This recommendation has not, however, been implemented in the Contempt of Court Act 1981: and cannot, therefore, be said to represent the existing law. It is submitted, however, that the proposal points the correct direction for the law of scandalising the court to take.

In summary, therefore, although the precedents examined above appear clearly to establish that mens rea is not a requirement for the crime of scandalising the court at common law, it is submitted that Nigerian law should follow the English statutory lead[3] in asserting that mens rea is an element of liability; and that the intention necessary is the specific intent to bring the administration of justice into disrepute.

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1. Report of the [Phillimore]Committee on Contempt of Court, Cmnd 5794, 1974.

2. Ibid., para. 164. The Committee's further recommendation are are discussed at p. 979 et seq.

3. Assuming, of course, that the Contempt of Court Act 1981 has indeed made mens rea a requirement for liability, as submitted by Arlidge & Eady, and discussed at p. 956 - 957, especially at p 957 n 1.

## 10.8. Defences to a Charge of Scandalising the Court

Having examined the types of allegation regarded as scandalising the court and the test of liability for the offence, it remains to consider the defences which may be raised by an alleged contemnor against a charge of this nature.

### 10.8.1. Failure to make out a *prima facie* case

In keeping with general principles of criminal responsibility, an alleged contemnor is entitled to discharge if the surrounding circumstances are not such as to substantiate a *prima facie* case of scandalising the court. An example of this is provided by *Agbachom* v *The State*.[1] Here, as previously explained,[2] the Supreme Court of Nigeria set aside a conviction for contempt on the ground that the allegation in question (that a certain sum had been paid to a trial judge as 'legal debt' out of a 'trust fund') was inherently ambiguous. There were 'two equally likely possibilities'[3] as to the proper interpretation of the offending statement; and this meant that contempt, 'an offence of a criminal character',[4] had not been proved, as required, 'beyond reasonable doubt'.[5]

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1. [1970] 1 All N.L.R. 69, reproduced by Fawehinmi, *op.cit.*, pp. 65-72.
2. See p. 928.
3. See Fawehinmi, *supra*, p. 69.
4. *Ibid*.
5. *Ibid*.

10.8.2. Absence of Mens Rea

As previously emphasised, mens rea is not a constituent element of liability at common law; and it is accordingly no defence for the alleged contemnor to establish that he had no intention of binging the administration of justice into disrepute. It is not proposed to repeat the earlier discussion of this principle and the need for its reform; but the practical significance of the rule is perhaps underlined by recalling, in brief outline, the facts of two Nigerian decisions involving the 'scandalising' of the court by the media. In R v Service Press Ltd.,[1] the criticism contained in the newspaper article in issue was aimed principally at 'Gentleman A.J. Sangster', then Vice-President of the Ibadan branch of the N.C.N.C.; and the allegation that he was on terms of 'close intimacy' with white officials, including 'Her Majesty's High Court Judges'[2] was only one of a number of charges made against him. The article was essentially a piece of political invective; and it seems plain that intent to bring the administration of justice into disrepute was far from its author's mind.[3] The decision seems extremely harsh; and underlines the need for absence of mens rea to be recognised as a defence.

The second case of note in this regard is R v Onweugbuna and another[4]

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1. (1952), 20 N.L.R. 96, reproduced by Fawehinmi, op.cit., pp. 230-233.

2. See Fawehinmi, ibid., p. 231.

3. It could perhaps be argued that the accused had dolus eventualis or general intent in that he should reasonably have anticipated the adverse consequences of publication to the standing of the judiciary. It is submitted, however, that the facts of this case graphically demonstrate why such general intent should not be recognised as sufficient for liability.

4. [1958] 2 E.N.L.R. 17, reproduced by Fawehinmi, ibid., pp. 243-248.

in which, (it may be recalled), a letter detailing a secret conspiracy to destroy the political group known as the Zikist National Vanguard through, inter alia, the connivance of a particular judge 'who had promised to give [its supporters] maximum punishment'[1] was found to constitute contempt. It seems plain that the editor of the newspaper, into whose hands this confidential document had fallen by accident, considered it his duty to publish the letter, so as to inform the public of the secret machinations against the party in question. It seems equally clear that the last thing in his mind was any intent to undermine the general administration of justice. Yet absence of mens rea was clearly considered irrelevant by the court, which stressed that '[i]f the publication is made .... and the words are calculated to bring the court into contempt, the wrong has been done'.[2] The only defence contention specifically based on the issue of mens rea was that the printer and publisher of the newspaper, being a limited company, was not capable of forming a guilty intention. This undoubtedly spurious (and commensurately misconceived) contention was swiftly rejected by the court.[3] This aspect of the court's conclusion was undoubtedly correct. Yet the judgment as a whole leaves the uncomfortable impression of punishment being meted out to the fundamentally innocent: and, worse still, to persons who bona fide believed it their public duty to make the secret conspiracy known. Accordingly, the case also raises the question of

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1. See Fawehinmi, ibid., p. 244.

2. See Fawehinmi, ibid.

3. Ibid. The court simply pointed out that 'it has repeatedly been held that a corporation is capable of forming a criminal intention'; and it cited as authority, inter alia, R v Service Press Ltd., supra, and R v Odhams Press Ltd., ex parte Attorney-General [1956] 3 All E.R. 494. (The reliance place by the court on the latter case seems to come extent inappropriate: for the decision involved a publication infringing the sub judice rule).

the need for some defence of overriding public interest or benefit in publication; and this is considered further in due course.

10.8.3. The defence of 'reasoned criticism'

Closely related to the defence of failure to make out a prima facie case (of which, indeed, it forms one particular facet) is the defence that the publication in issue constitutes no more than bona fide and reasoned criticism, and hence does not amount to scandalising the court at all. Various Nigerian decisions upholding the legality of such criticism have previously been noted; and suffice it therefore to recall the view expressed by the court in one particular decision: Aniweta v The State.[1] Here, it will be recalled,[2] the allegation in issue was that a trial judge had accepted a bribe of ₦2000 in return for altering his judgment in particular proceedings. On appeal from conviction for contempt, the Federal Court of Appeal stressed that 'genuine criticism'[3] does not constitute contempt; but also emphasised, on the particular facts, that the allegations in question 'had nothing to do with any criticism'.[4] Instead, [t]hey were a brutal attack on the person of the judge as a most corrupt person unfit to sit to hold his high office'[5] and constituted the 'most gruesome insult that ha[d] ever been directed personally against a Judge in the history of th[e] country'.[6]

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1. Appeal No FCA/E/47/78, reproduced by Fawehinmi, op.cit., pp.98-116.
2. See p. 927.
3. See Fawehinmi, supra, p. 113; and see also p. 111.
4. Ibid, p 113.
5. Ibid.
6. Ibid.

In these particular circumstances, little criticism can be directed against this conclusion. However, it should be noted that the outer limits of 'reasoned criticism' are not entirely clear (as previously emphasised)[1] and that the judiciary appears to have particular difficulty in accepting that an imputation of partiality may fall within this category.

10.8.4. The defence of public interest or benefit

Two of the decisions discussed above raise in stark terms the need for a defence of overriding public interest or benefit in publication. The first such case is R v Service Press Ltd.,[2] in which it might legitimately have been contended that the public interest required that judicial conduct of the kind alleged (disclosure by a judge to a political crony of his proposed verdict in proceedings) be brought into the open. The second such decision is R v Onweugbuna and another,[3] in which the argument for exonerating the defendants from liability on the basis of public interest in publication seems overwhelming. Here, it may be remembered, the editor and publishers of the Eastern Sentinel were convicted of contempt for publishing a letter detailing a secret plot to destroy a particular political party. The fact that this was to be achieved (according to the letter as published) through - inter alia - the assistance of a particular judge,was a minor aspect of the conspiracy revealed. It was contended on behalf of the accused that the "captured" letter was quite genuine; and that it had accordingly

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1. See p. 944, et seq.

2. (1952) 20 N.L.R. 96, reproduced by Fawehinmi, op.cit., pp. 230-233.

3. [1958] 2 E.N.L.R. 17, reproduced by Fawehinmi, op.cit., pp. 243-248.

been published by the editor in good faith and in pursuance of what he considered to be his duty'.[1] This argument was given short shrift. In the court's view, 'it [was] not easy to see how it [could] be the duty of a newspaper to publish confidential letters which have fallen by "capture" into the hands of those for whom they were not intended';[2] nor did it accept that it was (or could have been considered to be) the duty of the editor 'to present matters in this way, taking into consideration that the courts were involved'.[3]

It thus seems clear that the common law recognises no defence of overriding public interest in disclosure. This lacuna is most disturbing: for there is a vital need for a defence of this nature. Even if it could be accepted (as further discussed below) that the common law does recognise the defences of justification and fair comment (by analogy with the law of defamation), it is more than probable that neither would have availed the accused in these particular circumstances. Both defences depend on proof of truth (to a greater or lesser extent[4]); and this would have been extremely difficult to provide, given the secret nature of the conspiracy. Thus, a defence of overriding public interest is the only one on which the defendants (under the present objective test of liability) could have relied.

Moreover, on the particular facts of the case, the court's total rejection of the defence contention that publication had been motivated by the

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1. See Fawehinmi, ibid., p. 247.

2. Ibid.

3. Ibid.

4. The defence of justification requires proof of the truth of the statements made. The defence of fair comment requires that the matters commented upon be true. A detailed analysis of the defences is provided in the section on the civil law of defamation, at p.486 and p 490, et seq.

highest sense of public duty is disquieting in the extreme. If the N.C.N.C.[1] were truly engaged in such schemes, it was very much in the public interest that these should be revealed - even if this entailed adverse comment on one particular member of the judiciary. It is no doubt true that public confidence in the judge in question was likely to have been eroded by publication of the letter. Yet would this necessarily have undermined the proper administration of justice? One would imagine that quite the contrary would be true; and that the administration of justice would be far better served - in the long term - by disclosure of such conduct on the part of individual judges. Far better that the allegation be made - and that it then be either vindicated or refuted - than that the public be kept in total ignorance of matters of such vital importance.

It remains to consider whether any other defences are open to the alleged contemnor; and the close analogy between criminal libel and scandalising the court prompts inquiry as to whether some of the defences available to the former charge may not also be relied upon in relation to the latter. The defences which seem particularly apposite in this regard are, of course, those of 'justification' and 'fair comment'.

### 10.8.5. The defence of justification

The elements of justification have previously been examined in the context of the law of defamation. Suffice it therefore for present purposes to reiterate that the essence of the defence is the truth of the publication

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1. For further information as to the N.C.N.C., see the section on the History of Nigeria, at p. 77 above. As regards the possible truth of the allegation against them, it is worth recalling (as pointed out in the section on the civil law of defamation at p.548 above) that considerable concern has been expressed by commentators as to the abuses perpetrated from time to time by the N.C.N.C. and its political rivals, which reached their height in the large-scale rigging of the 1964 and 1965 elections.

in issue.[1] Under the law of criminal (as opposed to civil) libel, a further essential requirement is that the publication should be for the public benefit.[2]

Nigerian authorities provide no guidance as to whether justification constitutes a defence; and little consideration has been given to the availability of the defence in the English precedents described above. However, such authority as there is strongly suggests that 'justification' cannot be relied upon as a defence to a charge of scandalising the court. Thus, in Skipworth's[3] case, Blackburn, J. rejected the defendant's entreaty that the matter go before a jury, so as to give him an opportunity to prove the truth of his allegations; and did so on the basis that:

> 'The truth of it has nothing to do with the question. The question at present is, is he trying to interfere with the course of justice?'[4]

It must, of course, be acknowledged that the case is not entirely in point since it concerned a publication which infringed the sub judice rule rather than one scandalising the court. It is submitted by Borrie and Lowe,[5] however, that 'the same principle may ... apply'[6] to both .

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1. See p. 486 above, and Miller, op.cit., p. 193.
2. See p. 622 above, and Miller, ibid.
3. Skipworth and Castro's Case, (1873) L.R. 9 Q.B. 230.
4. Ibid., at 234.
5. Op.cit.
6. Ibid., pp. 164-165. Cf Miller, op.cit., p. 193, n 3, who submits that the case is hardly in point because the issues are fundamentally different.

Somewhat stronger authority is provided by Vidal's[1] case, where the accused expressly objected to the charge of contempt and urged that he should have been prosecuted for criminal libel - in which event, he would have relied upon justification as a defence. It seems, however, that '[t]he objection was waved aside, and there is no suggestion that the Divisional Court thought it possible for him to raise the defence in contempt proceedings'.[2]

In addition, it seems clear that justification was not a defence, at common law, to a prosecution for criminal libel;[3] and that it required specific introduction by statute.[4] This casts grave doubts on the question whether the defence could be available - without similar statutory intervention[5] - in the context of scandalising the court.

Furthermore, the fact that justification is not a defence to a charge either of contempt of parliament (through publishing derogatory matter)[6] or of publishing a seditious libel,[7] strengthens the inference that it cannot be relied upon in relation to scandalising the court.

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1. The Times, 14 October, 1922, previously discussed at p 906.

2. Miller, op.cit., p. 193.

3. See Miller, ibid., citing The Case De Libellis Famosis (1606) 5 Co Rep 125a; 77 E.R. 250 and Holdsworth, History of English Law, (2nd ed), Vol. VIII, p. 336, et seq.

4. See s 6, Libel Act 1843, (discussed at p.623 above).

5. This, of course, has not taken place - notwithstanding the Phillimore Committee recommendations discussed at p.979 below.

6. Miller, supra p. 193.

7. Miller, ibid., at n 3. But see also the discussion at p.414 above, which suggests that, in Nigerian law at least, truth is not an entirely irrelevant consideration on a charge of sedition.

Commonwealth authority also suggests that the defence is not available at common law. Thus, in the New Zealand case of Attorney-General v Blomfield,[1] Williams, J. agreed that 'it should certainly be open to [an] accused [on a charge of scandalising the court] to bring forward evidence in justification, and to show whether and how far his imputations were justified'.[2] His conclusion, however, was that:

> 'That has never been done and cannot be done in summary proceedings for contempt. The Court does not sit to try the conduct of the Judge'.[3]

It is interesting to note, however, that the Phillimore Committee has recommended that a defence of 'justification' should be introduced.[4] The requirements of the defence would be first, that the matter in issue is true; and, secondly, that its publication was for the public benefit. The second requirement could only be met, however, if the accused 'had previously taken steps to submit the evidence of corruption or partiality to the Lord Chancellor'.[5] Substantially the same recommendation has also been made by the Law Commission,[6] 'which agrees that such a defence should be available'.[7]

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1 . (1914) 33 N.Z.L.R. 545.

2, See Miller, op.cit., p. 193.

3. Attorney-General v Blomfield, supra, at 563.

4. The Phillimore Report, Cmnd 5794, 1974, para. 166.

5. Ibid., para 166.

6. See the Law Commission Working Paper No. 62; 'Offences Relating to the Administration of Justice', para 114.

7. Ibid.

These proposals stand in marked contrast to earlier recommendations of the Justice Committee, who - in their report Contempt of Court[1] - submitted that such a defence should not be made available. Its main ground for so concluding was its belief that the media were not 'appropriate organ[s]' for making any allegations against the judiciary. It acknowledged that 'if someone wishes, in good faith, to make a charge of partiality or corruption against a judge he ought to have the opportunity of making it'; but believed that (instead of using the press for this purpose) he should rather 'do so by letter to the Lord Chancellor or his Member of Parliament' - and should be permitted this right 'without fear of punishment' for contempt.[2] 'The charges could then [in the Committee's view] be considered either administratively or in the House of Commons or the House of Lords'.[3]

Considerable difficulties lie in the way of the latter suggestion, however. This is principally because of the rule of Parliamentary procedure which permits questions regarding the conduct of particular judges or of the judiciary in general to be raised only 'on a substantive motion which admits of a vote and not during the normal course of a debate'.[4]

Miller submits that, on balance, the Phillimore (and Law Commission) recommendations provide the best solution. In his view, the principal argument against the proposals is the possibility that the defence

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1. See p. 15 of the Report, published in 1959. See also the report of the Justice sub-committee, The Judiciary, (1972), para. 88, (cited by Miller, op cit., p. 193, n. 5).

2. See p. 15 of the Justice Report, supra.

3. Ibid.

4. Miller, op.cit., p. 194. In illustration, Miller describes the difficulties experienced during the House of Commons debate on the Industrial Relations Act in December 1969, which took place 'against a background of criticism which had been levelled at ... the President of the National Industrial Relations Court' and during the course of which the Speaker was obliged to intervene on a number of occasions to remind members that: 'Reflections on the judge's character or motives cannot be made except on a motion'.

'might be abused by someone intent on reopening the issue of liability via the backdoor by imputing a lack of impartiality to the presiding judge'.[1] Miller's submits - with cogency - however, that 'it is ... doubtful whether this would occur frequently in practice'.[2]

These recommendations have not yet been implemented in the United Kingdom, however, for no provision for such a defence is to be found in the new Contempt of Court Act 1981. It is submitted, however, that the proposal for such a defence is sound - and that this reform (at minimum)[3] should be put into effect in Nigerian law (without waiting for further English lead).

The effect of such a reform would largely be, however, to subsume within one head both 'truth' and 'public benefit'; and it is questionable therefore whether this is indeed the optimum solution. In a situation such as that in R v Oweugbuna and another,[4] it would be extremely difficult to prove the truth of the secret plans: and if the only defence available were a "joint" one of truth and public benefit, this would be of little assistance. It seems then that there is still a need for 'public benefit' in publication to rank as a separate and distinct defence: and this inevitably raises the question of whether the'public benefit' element should be added to the defence of 'truth'. The result is undoubtedly to increase the burden on the accused; and it is doubtful whether this is consistent with the constitutional guarantee of freedom of expression. Furthermore, the third "leg" of the Phillimore and

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1. Miller, ibid., pp. 193-194.

2. Miller, ibid., at p. 194.

3. It is submitted that a number of further reforms are also required, as indicated above and further examined below.

4. [1958] 2 E.N.L.R. 17.

Law Commission proposals - that recourse must first be had to the Lord Chancellor - may result in considerable practical difficulty, especially in a situation similar to that in R v Onweugbuna.[1] Should the editor and publishers of the newspaper - who may well have believed that there was considerable urgency in bringing the conspiracy to the attention of the nation - have been compelled to wait until they had first cleared it with some equivalent figure, such as the Chief Justice of Nigeria? The delay entailed may have been considerable; and, even more seriously, the requirement imposes a form of 'prior restraint' on publication; and it is questionable whether this, too, can be squared with the constitutional guarantee of free speech. Moreover, it imposes a heavy responsibility on the person charged with the duty: and the temptation may well be for such person (especially if he were himself a judicial officer) to err on the side of over-caution.

Accordingly, whilst it is apparent that implementation of the United Kingdom proposals would go some way to meet the present deficiencies in the law, it is submitted that the better approach would be recognise both 'truth' and 'public benefit' as distinct defences: and to allow each to stand on its own - without the need for any prior sanction for publication.

### 10.8.6. The defence of fair comment

The requirements for successful reliance on the defence of fair comment in the law of defamation have previously been analysed in full.[2] In essence, the publication must consist of comment[3] (rather than allegation

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1. Ibid.
2. See p. 490, et seq.
3. See Miller, op.cit., p. 194; and the discussion at p. 491.

of fact) and the comment must be based upon facts which are true (or published on a privileged occasion).[1] The comment must also be 'fair' - meaning that it must be proffered bona fide and honestly (but not that it need be founded upon objectively reasonable grounds).[2] Nigerian precedents are silent as to the availability of an equivalent defence to a charge of scandalising the court. In approaching this question, it must of course be remembered that insofar as 'fair comment' consists in 'reasoned criticism' it falls - in any event - outside the ambit of the offence of scandalising the court. There is, however, considerable doubt as to whether criticism in the form of an imputation of judicial bias is considered lawful at common law, as previously explained.[3] Hence, where criticism takes this form (as is frequently the case[4]), the question whether prima facie liability can be avoided through a defence of fair comment is of crucial importance. No judicial decision in England or Nigeria appears to have faced this issue squarely: but it nevertheless appears that there is considerable support for the availability of such a defence. This is most clearly evident in the Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry;[5] which seems to assume that the defence forms part of common law. It thus states:

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1. See Miller, ibid., and the discussion at p. 492.

2. See Miller, ibid., and the discussion at p. 490.

3. See p. 944 et seq.

4. As pointed out in the discussion on the legality of reasoned criticism above, it appears that allegations against judges or the judiciary take, in the great majority of cases, the form of an imputation of bias.

5. Cmnd 4078, 1969.

> 'In the most unlikely event, however, of there being just cause for challenging the integrity of a judge or a member of a Tribunal of Inquiry it could not be contempt of court to do so. Indeed it would be a public duty to bring the relevant facts to light'.[1]

As authority, the Report cites the Australian case of R v Nicholls,[2] where committal proceedings against the editor of The Mercury newspaper (for publication of an article allegedly imputing bias to a judge of the Arbitration Court) were dismissed by Griffith, C.J. who - in a strongly-worded statement worthy of reproduction in full - emphasised the important role such criticism may play. He stated:

> 'I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel'.[3]

This passage has been cited with approval in a number of subsequent Australian decisions;[4] and the availability of a defence akin to 'fair comment' seems clearly to have been recognised in that jurisdiction. It is submitted that similar recognition should now be accorded the defence in Nigeria, to provide some shield against liability in a

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1. Ibid., para. 36.

2. (1911) 12 C.L.R. 280.

3. Ibid., at 286. This dictum has, of course, previously been reproduced at p. 944, but is sufficiently significant to warrant quotation once more - especially in the light of the intervening discussion.

4. See Miller, op cit, p 195 and the authorities he cites at n 14.

situation similar to that in R v Jackson.[1] Here, it may be recalled,[2] the accused had charged the judiciary with favouring the executive in its decisions. A defence of fair comment may well - in the particular circumstances[3] - have served to exonerate him from liability.

## 10.9. The Practical Need for Reform of the Law

From the preceding discussion, it is apparent that there are a number of deficiencies in the common law of 'scandalising the court'; and the need for reform - in principle - is clearly evident. It remains to consider, however, whether such reform is indeed required in practice: or whether the offence has fallen into desuetude to such an extent that this does not seem warranted.

In Nigeria, the cases directly involving the media are all somewhat old decisions. This is particularly true of R v Jackson[4] and R v Service Press Ltd.,[5] decided in 1925 and 1952 respectively: whilst R v Onweugbuna and another[6] was determined in 1958. Since then, there appear to have been no reported cases of contempt of this kind in which the media have been concerned: but allegations of judicial partiality made by litigants or their counsel have (as previously

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1. (1925) 6 N.L.R. 49.

2. See p. 913 et seq.

3. The article was prompted by the decision of the Lagos High Court in the Eshugbayi case. The truth of the facts commented on would therefore have been relatively easy to establish: and it might also have been possible to show that the comment was 'fair': in the sence that it was honest, even if not objectively reasonable.

4. (1925) 6 N.L.R. 49.

5. (1952) 20 N.L.R. 96.

6. [1958] 2 E.N.L.R. 17.

described)[1] come before the courts on a number of occasions during the last decade.

In other Commonwealth jurisdictions, such as Canada and Australia, there have also been a number of recent cases in which scandalising the court by the media has been in issue. Far from the law having fallen into desuetude in these countries, it seems to be alive and thriving: and continuing to provide a vehicle for the expression of what has previously (and justifiably) been described as judicial 'hyper-sentivivity'.[2]

In England itself, however, the source of the relevant rules in these countries, the law does appear to be falling into disuse. The last prosecution for scandalising the court was that in R v Colsey,[3] decided in 1931. This may suggest either that the judges have become more tolerant - or that the media have learned greater caution. Some of the more outspoken criticisms in the English press (which have been allowed to pass without prosecution) suggest that the former may be the more accurate explanation. Thus, for example, the press has strongly criticised the judiciary for imposing its own views of dress[4] and morality[5] upon litigants and has not minced its words on occasion in commenting on the sentences imposed by the courts. By way of illustration, the Daily Mirror, described the sentence imposed in a baby-snatching case in the following terms :

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1. See p. 925 et seq.

2. See p. 932 et seq.

3. The Times, 9 May 1931.

4. See The Guardian, 24 February 1970, for a 'hard-hitting article' which accused a county court judge of 'unusual stuffiness and bad manners' for having 'ticked off' a woman for wearing a trouser suit to court: See Borrie & Lowe, op.cit., p. 157.

5. See also The Observer, 26 February 1967, in which the judiciary were reminded (following comments by a Divorce Commissioner to the pop singer Sandie Shaw that she was a 'spoilt child') that 'The Judges' bench is not a pulpit from which to pronounce on personal morality'. (See Miller, op.cit., p. 196).

> 'Shocking. Atrocious. Unbelievable. That is the reaction of most people to the 21-month jail sentence on Jacqueline Paddon, the girl with a history of mental disturbance, who ran off with a friend's baby'.[1]

Other examples (such as the recent strong criticisms of sentence in rape cases) are not hard to find.[2]

On the other hand, the explanation for the paucity of prosecution may also be that the press has come to err on the side of over-caution, as the following speech of Lord Gardiner (speaking as Lord Chancellor in a House of Lords debate) appears to indicate:

> 'The law is not in any doubt. It is a free country. Anybody is entitled to express his honest opinion about a sentence and about the way in which the judge has conducted a case, though it is desirable that it should not overstep the bounds of courtesy and should not be a virulent personal attack on a judge. But, subject to that, the administration of justice is not, as Lord Atkin once said, a cloistered virtue, and anybody is entitled to express his honest opinion about it. I have tried for about thirty years to persuade newspapers that this is the law. They will not believe it'.[3]

With due respect to Lord Gardiner, however, his comments do seem to over-state the case. It is of course true that reasoned criticism is not punishable; but the dividing line between comment which is lawful and that which constitutes contempt is extremely thin, as the case

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1. The Daily Mirror, 2 November 1972. (See Miller, ibid).

2. Miller, ibid., p. 196.

3. See Hansard, H.L. Deb. Vol. 274, cols. 1438 - 39, 25 May 1966, cited by Miller, ibid., p. 196, n 6.

of S v Van Niekerk[1] graphically demonstrates. Moreover, the doubt as to whether imputations of bias can ever constitute reasoned criticism destroys the practical efficacy of much of Lord Gardiner's point that 'justice is not a cloistered virtue'. It is not safe to assume, under the present common law, that the imputation of judicial bias attracts no liability for contempt: nor is it justified to infer - from the mere fact that the law has only rarely been invoked in the past - that it will not again be used in the future. The example of the prosecutions recently brought in the United Kingdom for the "obsolete" crime of criminal libel[2] demonstrates the danger beyond any doubt.

It follows, thus, that there is indeed a practical need for reform of the law of scandalising the court; and the question which this, of course, raises is the direction such reform should take. A number of specific suggestions have previously been made, but before examining these further it is instructive to note both the reform proposed by the Phillimore Committee in the United Kingdom in this regard: and the radically different approach to the entire problem adopted in the United States of America.

## 10.10. The Reform Proposed by the Phillimore Committee

The reform proposed by the Phillimore Committee in the United Kingdom is that this branch of the law of contempt should be abolished; and that it be replaced by a new and strictly defined criminal

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1. [1970] 3 S.A. 655(T). Here, it may be recalled, the accused had published, in the South African Law Journal the results of a survey of opinion amongst South African legal practitioners, which indicated their belief that imposition of the death penalty was affected to some degree by racial prejudice.

2. See p. 595 above.

offence',[1] which should be triable only on indictment (rather than through the summary process)[2] and only at the instance of the Attorney-General.[3] The new offence would be constituted 'by the publication, in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice';[4] and '[c]riticism, even if scurrilous, [w]ould only be punishable if it fulfilled these two requirements'.[5]

This proposal, particularly with its insistence that summary process be avoided, that the consent of the Attorney-General be required for prosecution and that the imputation be made with intent to impair confidence in the administration of justice is greatly to be welcomed. The latter requirement, in particular, is especially significant; and, if adopted in Nigeria, would help to ensure[6] that persons in the postition of the accused in R v Onweugbuna and another[7] could no

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1. The Phillimore Report, Cmnd 5794, 1974, para. 164.

2. See ibid. This recommendation reflects the view of the Committee (at para 163) that the urgency of the summary process is not normally required and that summary trial may also contravene the nemo judex in sua causa principle, even though 'the judge who was himself the subject of attack would not in practice sit to hear the case'. On the other hand, the Committee did also consider that an imputation made in facie curiae or which created a risk of serious prejudice to particular pending proceedings could properly be dealt with summarily 'on that basis'.

3. See ibid. This recommendation applies to England and Wales. Slightly different proposals are made for Scotland and Northern Ireland; but these lie outside the scope of this study.

4. Ibid.

5. Ibid.

6. Hard-and-fast prediction is never advisable; and much depends on the strictness with which the requisite intent is to be gauged. If indirect intent (based on reasonable foresight) is sufficient for liability, and motive is considered irrelevant, the position may not, in fact, be much improved.

7. [1958] 2 E.N.L.R. 17.

longer be found guilty of contempt. Whether it would assist a defendant in the position of the accused in R v Jackson[1] is, however, a matter of considerably more doubt. 'Intent' must presumably be understood as including 'indirect' intent, based on reasonable foresight of the likelihood of the prohibited consequence resulting in fact; and intent of this kind would be relatively easily established in the circumstances of Jackson's case. It is accordingly all the more unfortunate that the Committee made no attempt to clarify the present uncertainty regarding the legality of reasoned criticism when this takes the form of an imputation of judicial bias. Accordingly whether an allegation of this nature would fall within the category of 'matter imputing improper or corrupt judicial conduct'[2] must remain a matter of some speculation. Prima facie it would do so; and whether the fact that the imputation was temperate and based on legitimate grounds would make any difference to liability remains uncertain.

The Committee's reasons for concluding that the common law offence of scandalising the court could not be abolished without replacing it with a new statutory crime are interesting: but do not stand up to close scrutiny. The Committee cited two reasons for introducing a replacement offence: first, the fact that the law of defamation does not provide appropriate or adequate redress;[3] and, secondly, the special position in which the judiciary is placed, which constrains judges from 'tak[ing] action in reply to criticism'[4] and gives them no

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1. (1925) 6 N.L.R. 49.

2. This, as indicated above, is one of the crucial elements which must be shown for liability under the proposed law.

3. See the Phillimore Report, supra, para. 162.

4. Ibid.

proper forum for so doing, as enjoyed by other public figures.[1]

As regards the first of these reasons, the Committee was particularly swayed by the fact that this branch of the common law 'is only incidentally, if at all, concerned with the personal reputation of judges';[2] whilst, in addition, if an attack was made upon 'an unspecified group of judges',[3] it might not be possible for it to found libel proceedings at all. It is submitted, however, that neither objection is valid. Any attack on a judge's impartiality (to take but one example) is first and foremost a threat to his personal reputation; and only at second remove does it undermine respect for the judiciary as a whole and hence the proper administration of justice. It is, of course, traditionally asserted that the purpose of this branch of the law of contempt is not to facilitate personal vindication of a judge's good name but simply to uphold the machinery of justice: but it may be queried whether this is an appropriate approach (especially in the light of all the defects in the present law of scandalising the court). If the judge whose impartiality is impugned is able to clear his good name through proceedings for defamation, the general administration of justice will simultaneously be vindicated. The choice as to which avenue of redress to pursue (under either the law of libel or contempt) is essentially one of public policy, for the ultimate goal is the same. Faced with this election, there seems sound sense in leaving the judge impugned (as the primary object of attack) to protect his own reputation through the law of libel. Moreover, bearing in mind

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1. Ibid.

2. Ibid.

3. Ibid.

the deficiencies in the law of scandalising the court as presently constituted, this approach seems eminently more "fair" to the publisher, since it is only the law of defamation (unlike that of contempt) which gives the accused a reasonable opportunity of avoiding liability through defences such as justification and fair comment. On policy grounds, therefore, it is preferable that the individual judge be left to vindicate his own good name in proceedings brought under the ordinary law of defamation. As for the fear expressed by the Committee that an attack on an 'unspecified group' of judges would then escape punishment altogether, this must surely be misconceived. The concept that a member of a 'class' may be defamed by innuendo is well-established: and the judiciary in a given state would undoubtedly be a sufficiently well-defined and established group to qualify as a 'class' for this purpose.[2]

As regards the Committee's belief that '[j]udges feel constrained by their position not to take action in reply to criticism',[3] it is submitted - in the first instance - that this is not borne out by the facts, as Nigerian experience graphically demonstrates. The judges who considered themselves unfairly attacked in R v Jackson,[4] and in Aniweta's,[5] and Deduwa's[6] cases - to name but three examples - felt little constraint in taking action against the alleged contemnors. It is submitted that it would, in fact, have been far more consonant with the dignity of their judicial office not to have invoked the summary process in these instances but rather to have sought redress through the

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1. See the discussion of class actions in the in the civil and criminal law of defamation at pp. 475 and 610. Although the matter is not altogether free from doubt, the balance of authority seems clearly to support the availability of such actions.

2. See the discussion of the attributes of a 'class' at p. 674 above.

3. The Phillimore Report, supra, para 162.

4. (1925) 6 N.L.R. 49, discussed at p 913.

5. Aniweta v The State, Appeal No FCA/E/47/78, discussed at p. 927 above.

(continued)

measured procedures of the ordinary law of libel. Moreover, the mere assertion that judges have some special and particularly delicate position in society does not ring true. It is clearly one further aspect of the mystique which presently surrounds the judiciary and on which the law of scandalising the court is largely based. This further manifestation of the myth should not be allowed to continue; and it should instead by recognised that judges are appointed to fulfill particular tasks within society; that they may do the job either well or badly (just as other individuals may in other occupations); and that the best interests of the community demand that their performance should indeed be subject to critical scrutiny: and that they should not be given any further protection against this than that afforded by the ordinary law of defamation.

One final point of criticism regarding the Committee's proposals remains to be noted. This is the fact that the Committee gave singularly little attention to the need for further defences against liability; and confined itself to recommending that a defence of 'justification', as previously discussed,[1] should be introduced. In itself, however, such a defence (even without the defects earlier described[2]) does not provide sufficient protection against conviction. The defence of fair comment is needed to provide a shield against liability in this branch of law as in the sphere of defamation;[3] and there is a crying need for the introduction of a further defence based on overriding public

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(continued)

6. Deduwa and others v The State, [1975] 1 All N.L.R.1, discussed at p. 926.

1. See p. 970.

2. See p. 971 et seq.

3. See p. 975 - 976.

interest in publication,[1] as Onweugbuna's[2] case so clearly shows. It is accordingly most unfortunate that the Committee made no attempt to deal with these lacunae in the present law; nor to indicate to what extent fair comment or public interest should be available as defences under the proposed new law.

In summary, then, it is submitted that the Committee has erred fundamentally in insisting that the common law offence should be replaced by a new statutory crime. Even if the Committee's premises are accepted, moreover, its proposal is nevertheless deficient in a number of concrete respects: particularly in its failure to clarify the type of intent required, the legality of reasoned criticism in the form of imputation of bias, and the availability of the defences of fair comment and public interest. The Committee's recomendations in this context have not, of course, yet been implemented in the United Kingdom (as the Contempt of Court Act 1981 contains no provision in this regard). It is submitted that Nigeria would do well to note the Committee's criticism of the common law, as well as its recommendation that the offence of scandalising the court should be abolished: but that, for the rest, Nigeria would be better advised to follow the contrasting approach of the United States of America which (without formal abolition of this branch of law) has nevertheless resulted in the crime of scandalising the court becoming a dead-letter in practice.

## 10.11. The Contrasting Approach of the United States.

In the nineteenth century, an attorney (Luke Lawless) who had accused a federal judge (Peck) of bias in the adjudication of certain land

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1. See p. 965 et seq.

2. R v Onweugbuna and another, [1958] 2 E.N.L.R. 17.

claims[1] was cited by the judge for contempt, convicted and punished through being suspended from practice for some eighteen months.[2] For a number of years thereafter, Lawless pressed continually for Peck's impeachment; and, although the judge was ultimately exonerated,[3] 'Congress wanted no more punishment of the press for criticism of federal judges'[4] and it proceeded to pass legislation 'which said that federal judges might punish only for that misbehavior which took place "in the presence of the ... courts, or so near thereto as to obstruct the administration of justice"'.[5]

State courts, however, continued to punish for constructive contempt; and, in two important decisions of the Supreme Court in the early twentieth century, were upheld in so doing. The cases in question were Patterson v State of Colo. ex rel Attorney General[6] and Toledo Newspaper Co v United States[7] (previously discussed in the context of publications prejudicial to pending proceedings[8]).

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1. See Nelson & Teeter, Law of Mass Communications, 3rd ed., New York 1978, p. 30. Peck had financial interests in the land in question and Lawless proceeded to 'delineat[e] at length "some of the principal errors"' of Peck's decision regarding it.

2. See Nelson & Teeter, ibid.

3. See ibid. Impeachment proceedings were commenced after some four years and when the Senate finally voted, it 'exonerat[ed] Peck by the narrowest of margins'.

4. Ibid.

5. 18 U.S.C. c. 21 Contempts, § 401 (1976). This law was first enacted in 1831.

6. 205 U.S. 454, 27 S. Ct. 556 (1907).

7. 247 U.S. 402, 38 S. Ct. 560 (1918).

8. See p. 884.

The latter case is significant, however, for the dissenting opinion of Justice Holmes, who stressed that the words 'so near thereto' in the statute meant 'so near as actually to obstruct justice, and [that] misbehavior mean[t] more than unfavorable comment or even disrespect'.[1] In 1941, the Supreme Court in Nye v United States,[2] agreed. It held that '"so near thereto" means physical proximity and that punishment by summary contempt proceedings for published criticism is precluded'.[3]

Then came Bridges v California,[4] in which - it may be recalled - the Supreme Court established the principle that publications relating to pending proceedings[5] may not be restricted unless there is a 'clear and present danger' that they may thwart the proper administration of justice. Building upon that foundation, the Court has since made it clear that criticism of the judiciary (which, under the common law, would be prohibited as 'scandalising' the court) cannot be restricted unless it can be shown that it 'immediately imperils'[6] the judicial process.

Thus, in Pennekamp v Florida,[7] where the Miami Herald had published a cartoon and editorial 'designed to demonstrate that a Miami trial

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1. See Nelson & Teeter, supra, p. 345.

2. 313 U.S. 33, 61, S. Ct. 810 (1941).

3. Nelson & Teeter, op.cit., p. 345.

4. 314 U.S. 252, 62 S. Ct. 190 (1941), discussed at p. 884.

5. Although both cases considered under the Bridges title involved attempts to influence the outcome of particular proceedings in progress, the principle established by the case was broad enough to extend beyond such circumstances.

6. See Craig v Harney, infra.

7. 328 U.S. 331, 66 S. Ct 1029 (1946).

judge had, by certain rulings, favored criminals and gambling establishments'[1] and its publisher and associate editor had thereupon been fined for contempt, the Supreme Court unanimously reversed the decision of the lower court. Whilst the Florida court had emphasised that the publication 'impugned the integrity of the trial court, had tended to create public distrust for it, and had obstructed the fair and impartial justice (sic) of pending[2] cases',[3] the Supreme Court stressed that the restriction violated freedom of speech and of the press and declared:

> 'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice'.
> [4]

The following year, this principle was reaffirmed by the Supreme Court (by a majority of 6:3) in Craig v Harney.[5] Here, the publishers,[6] of 'an intemperate and inaccurate attack on a lay judge who had directed a verdict in a civil suit'[7] had been found liable for contempt; but the judgment was reversed on appeal to the Supreme Court. Whilst acknowledging that the 'news articles were by any standard an unfair report of what had

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1. Abraham, Freedom and the Court, 4th ed., New York, 1982, p 161.

2. To this extent, the decision overlaps into another category of publication: those which tend to prejudice fair trial and are therefore restricted, at common law, under the sub judice rule. The approach of the Supreme Court to this aspect of contempt has already been considered at p. 886.

3. Abraham, supra.

4. Pennekamp v Florida, supra, at 347.

5. 331 U.S. 367, 67 S. Ct. 1249 (1947).

6. The actual publisher, as well as the editorial writer and news reporters were all considered responsible for publication.

7. Abraham, op.cit., p. 161.

transpired',[1] the majority (through Mr Justice Douglas) emphasised that:

> 'The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil'.[2]

Again, in Wood v Georgia[3] (the most recent case on the issue[4]), the Supreme Court (by majority of 5:2) reiterated this principle. The proceedings arose out of a letter written by a sheriff in Bibb County, Georgia, to the Bibb County grand jury, in which he voiced his severe criticism of a judge of the Superior Court 'who had instructed the grand jury in racially charged, intemperate tones'.[5] The majority[6] concluded that the sheriff could not be cited for contempt as his actions 'did not present a danger to the administration of justice that should vitiate his freedom to express his opinions in the manner chosen'.[7]

The common law crime of 'scandalising the court' has thus been rendered a dead-letter in the United States and '[t]he rare contempt citation and conviction for publishing criticism of a court that occurs today

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1. Craig v Harney, supra, at 374.
2. Ibid, at 376.
3. 370 U.S. 375, 82 S. Ct. 1364 (1962).
4. See Abraham, supra.
5. Abraham, ibid., p. 162.
6. The majority opinion was written by Chief Justice Warren and the dissentients were Justices Harlan and Clark.
7. Wood v Georgia, supra, at 394.

is invariably overruled on appeal'.[1]

Given the difficulties caused by the rule against scandalising the court and the unacceptable derogation from freedom of expression it entails (as previously canvassed in the preceding section), there is thus considerable merit in the United States' approach: and it is submitted that the alternative it offers should be borne constantly in mind in examining the final question that remains for consideration: the constitutionality of the Nigerian law of scandalising the court in the light of the guarantee of freedom of expression enshrined within the 1979 Constitution.

## 10.12. The Constitutionality of the Law of Scandalising the Court in Nigeria.

It will be recalled that s 36 of the 1979 Constitution of Nigeria guarantees the right to 'receive and impart ideas and information without interference'.[2] The right is not absolute, and is accordingly subject to laws 'reasonably justifiable in a democratic society' for the purpose, inter alia, of 'maintaining the authority and independence of courts'.[3] The law prohibiting scandalising of court cuts clearly across the substantive right to freedom of expression, but equally clearly has, as its purpose, the maintenance of the authority of the courts. It follows that the constitutionality of the law depends on

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1. Nelson & Teeter, op.cit., p. 346.

2. s 36(1) Constitution of the Federal Republic of Nigeria, 1979.

3. s 36(3)(a), ibid.

whether it can be considered 'reasonably justifiable in a democratic society' for the attainment of this objective.

It is submitted that this question is best answered first by recalling some of the more objectionable features of the law, as described above; and then by examining the rationale for the rule and attempting to assess whether this stands up to scrutiny or serves the best interests of society.

The various deficiencies in the law spring readily to mind. The first and foremost is the principle that liability for scandalising the court at dommon law is strict; and depends entirely upon the objective likelihood of damage to the standing of the judiciary rather than the subjective intent to bring such consequence about.[1] The unfortunate results of this rule are graphically demonstrated by the case of R v Onweugbuna and another;[2] and the point will not be further emphasised here. The second objectionable aspect of the law is the lack of defences which it presently provides. The only defence clearly recognised is the prosecution's failure to make out a prima facie case: including, accordingly, its failure to show that the comment goes beyond reasoned - and lawful - criticism. Although there is some support for the availability of the defence of fair comment, this has not yet been clearly accepted by courts in either England or Nigeria.[3] Other vital defences - principally justification and public benefit (which are of paramount importance in the face of the strict liability rule) - have yet to be

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1. See the discussion of mens rea at p. 951 et seq.

2. [1958] 2 E.N.L.R. 17.

3. See p. 974 above.

recognised at all.

The third major defect in the law lies in the doubt as to whether an imputation of judicial bias can ever constitute 'reasoned criticism': and hence be regarded as lawful comment. Decisions such as those in S v Van Niekerk[1] and Ambard v Attorney-General of Trinidad and Tobago[2] graphically demonstrate the need for this uncertainty to be removed: and for it to be acknowledged - beyond all doubt - that 'fair, temperate and reasoned criticism', offered in constructive spirit, can never constitute contempt. The development of the legal system as a whole require the widest possible discussion of all the problems encountered in the attempt to reconcile conflicting forces within society through the mechanism of law; for only through full disclosure and debate can the difficulties endemic in this process be recognised: and appropriate measures be taken to resolve them.

A further important question is whether the rationale for the rule provides sufficient justification for it. This issue is extremely complex; and raises profound questions as to the proper role of the judiciary within society. Accordingly, full examination of the topic lies outside the scope of this study: but it is nevertheless instructive to note certain views recently expressed as to the foundation of the rule in Canadian society. Although these observations are specifically directed at the Canadian judiciary, which (it may be recalled[3]) has displayed considerable 'hyper-sensitivity' to criticism, they appear

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1. [1970] 3 S.A. 655 (T).

2. [1936] A.C. 322 (P.C.).

3. See p. 911 et seq and p 935 et seq.

to apply with equal force in other Commonwealth jurisdictions.

The contention which has thus been made is that the rule against scandalising the court is an off-shoot of a capitalist, individual-oriented ideology which, in the legal sphere, manifests itself in the notion of equality before the law; and which then requires that the judiciary be given primary responsibility for ensuring the maintenance of equal treatment. The only way this can be achieved is if the judiciary is seen by society to be applying the law equally to all persons. It thus becomes necessary for the judges to be intellectually and morally distanced from the community; and any comment 'which casts doubts on the ability, integrity or impartiality of the judiciary becomes by its nature subversive'.[1]

It needs little emphasis that there are major flaws in this approach to the judiciary, as previously noted.[2] The judiciary is as fallible as any other human institution; and there is no magic in elevation to the bench which enables an individual to discard attitudes long held and beliefs deeply engrained. Equality before the law is indeed a goal for which to strive: but it is not likely to be best attained through upholding the myth of judicial impartiality and infallibility. Far better that the 'protective convering'[3] be removed; and that realistic attempt be made to grapple with the problem.

In conclusion, it is accordingly submitted that the law against scandalising the court cannot be accepted as reasonably justifiable in a

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1. Martin, op.cit., p. 21. He submits that this also reflects a 'Tory view of the world', heavily premised upon respect for authority.
2. See p. 945, for example.
3. See Martin, supra.

democratic society. This is, firstly, because its many objectionable features combine to impose an intolerable burden on the alleged contemnor; and, secondly, because its very underlying rationale is suspect, and hinders rather than promotes the best interests of society. It follows that this entire branch of law should be considered void for inconsistency with the guarantee of freedom of expression enshrined within the Nigerian Constitution; and that it should no longer be available to punish publication of criticism of the judiciary. Instead, if any judge is personally attacked (as in R v Gray[1]) it should be left to him to institute proceedings for defamation to clear his good name and vindicate the responsibility entrusted to him by society. Likewise, if an entire bench is unjustifiably criticised (as, arguably, in R v Jackson[2] or S v Van Niekerk[3]), the possibility of all the judges thereby impugned bringing a class action for defamation should be acknowledged as providing adequate redress. There is no need, as recommended by the Phillimore Committee, for any residual offence to be introduced: especially when it is remembered that the law of defamation has both civil and criminal branches, so that criminal punishment for some particularly heinous comment could (if necessary[4]) be secured under the existing law of defamation.

If this suggestion seems too radical, however, then - at minimum - reforms should be introduced into the law to remove its principal objectionable elements and to bring it into line (to this extent) with

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1. [1900] 2 Q.B. 36, discussed at p. 905.

2. (1925) 6 N.L.R. 49, discussed at p. 913.

3. [1970] 3 S.A. 655(T), discussed at p. 947.

4. It needs little emphasis that such prosecution should be considered necessary only in extreme circumstances.

the constitutional guarantee of freedom of expression. Thus, strict liability should be replaced by a test based upon subjective intent to undermine the proper administration of justice; the legality of reasoned criticism (even in the form of imputation of bias) should be acknowledged beyond all doubt; and the defences of public interest, justification and fair comment should be introduced.[1] Furthermore, echoing the approach of the United States of America, it should be recognised, as stressed by the Supreme Court in Wood v Georgia,[2] that:

> 'Out-of-court publications regarding judicial proceedings are protected by the constitutional guaranty of freedom of ... [the] press unless a clear and present danger of substantive evils arising from the publication justifies an impairment of the constitutional right; [and even then] the substantive evil must be extremely serious and the degree of imminence extremely high before such utterances can be punished'.[3]

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1. It needs little emphasis that if the first two changes - especially the former - are introduced, the occasion for resorting to these defences will be much reduced. Nevertheless, their availability should be acknowledged in order to provide additional protection for freedom of expression.

2. 370 U.S. 375, 82 S. Ct. 1364, (1962).

3. See Wood v Georgia, 8 L ed 2d 569, at 570, para. 4, emphasis supplied.

# C H A P T E R  E L E V E N

## CONTEMPT THROUGH REPORTING COURT PROCEEDINGS

### 11.1. The Significance of this Branch of Contempt for Media Freedom

This branch of the law of contempt prescribes certain requirements which must be met by the media in reporting on proceedings in court: failing which those responsible for publication may be found guilty of contempt of court. The law, accordingly, has great significance not only for the media and the right to freedom of expression, but also touches on one of the most vital of all safeguards of the rights of the citizen. This is the principle that justice should be administered in open court and that society in general should be informed of what has transpired through media reports detailing the conduct and outcome of judicial proceedings. The secret proceedings of the Star Chamber have left behind a sinister spectre: and the right to the open administration of justice is now considered the most 'indispensable' of rights - without which 'the subjects of any State can-

not be said to enjoy a real freedom'[1]. It needs no emphasis, however, that the safeguard of individual liberty implicit in open trial has little real meaning in modern society unless the public at large is able to obtain information regarding judicial proceedings through media reports. The media accordingly fulfill a vital social role in reporting court proceedings: and the extent to which they may be held liable for contempt of court for so doing is a matter of the utmost public concern.

The obligations of the media in regard to the reporting of proceedings vary depending on whether proceedings are conducted in public or private. Private proceedings are, of course, fundamentally inconsistent with the vital principle of open trial; but it is nevertheless recognised that there are certain circumstances in which proceedings may properly be conducted outside the public view. Thus, for example, this may be appropriate in patent cases, where publicity would destroy the value of a patent and obviate the very purpose of bringing proceedings for its enforcement. Determining the instances in which proceedings may legitimately be held in private is not an easy matter, however,

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1. Scott v Scott, [1913] A.C. 417 (H.L.(E.)), per Lord Shaw of Dumferline, citing the historian Hallam, who stated: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, by far the first is the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise'.

since the law reflects considerable uncertainty in this regard. Yet the issue is of great concern to the media, as proceedings conducted in private are subject to wide-ranging restrictions on reporting which do not apply to those held in public. To make matters yet more complex, the ambit of reporting restrictions on private proceedings is also a matter of great uncertainty; and the overall result is to present the media with considerable difficulty in drawing the dividing line between lawful and illegitimate reporting.

Where proceedings are conducted in public, by contrast, the general rule is that the media are entitled to report them in full, subject to certain requirements and restrictions. Some of these are relatively easy to apply: for example, the rule that any report must be fair and accurate. Other restrictions, however, are bedevilled by considerable difficulty. Thus, much controversy surrounds the circumstances in which evidence given in open court may be withheld from publication (for example, to disguise the identity of a victim of blackmail who would not otherwise be willing to testify). Furthermore, the extent to which reporting of proceedings may be ordered to be postponed (in order, for instance, to prevent prejudice to related pending proceedings) is also a matter of considerable uncertainty[1]. The result, once more, is to present the media

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1. Cases in which both these particular problems have arisen are further discussed in due course.

with grave difficulty in the discharge of its important role in the reporting of court proceedings.

In the United Kingdom - the source of origin of these rules - the uncertainty which still surrounds the common law in this context has recently been highlighted by a number of important decisions. An attempt at reform has been made in the new Contempt of Court Act 1981, but this still leaves many difficulties unresolved. In Nigeria, however, no such attempt at reform of the law has yet been made; and the existing rules (both statutory and common law) continue (by their uncertainty and wide-ranging ambit) to inhibit the reporting of court proceedings to a considerable extent; and thus to jeopardize both media freedom and the fundamental principle of open justice: so essential to the maintenance of individual liberty.

## 11.2. Sources of Nigerian Law Regarding Media Reporting of Court Proceedings

Nigerian law relevant to the reporting of court proceedings by the media is to be found firstly in the Constitution of the country, which proclaims the right to open trial and full reporting in criminal proceedings: but also recognises a number of exceptions to this general rule[1]. The right to open trial is further buttressed by the terms of the Criminal Procedure

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1. See s 33(4), Constitution of the Federal Republic of Nigeria, 1979, further discussed below.

Acts[1] (applicable in the southern and northern states respectively) which confirm that criminal proceedings should, in general, be open to the public: subject, however, to further exceptions dependant upon the discretion of the presiding judicial officer. As regards reporting requirements, the Criminal Code[2] of the southern states contains two express provisions[3] governing the reporting of public and private proceedings respectively; but no equivalent rules are to be found in the Northern Penal Code[4].

Notwithstanding these statutory provisions, however, the common law of England is also an important source of Nigerian law in this context. The reasons for this are two-fold. First, the Nigerian legislation described above is silent as regards a number of further issues (such as the principle of open trial in relation to civil litigation and the reporting of public and private proceedings in the northern states); and this lacuna is filled by the common law rules of contempt: which, of course, apply within the entire country as part of the body of English

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1. Cap 43 (Laws of the Federation of Nigeria and Lagos, 1958), applicable in the southern states; and Cap 30 (Laws of Northern Nigeria, 1963), applicable in the North. The terms of both statutes - in this regard - are further discussed below.

2. Cap 42 (Laws of the Federation of Nigeria and Lagos, 1958)

3. ss 133(4) and (5), ibid.

4. Cap 89 (Laws of Northern Nigeria, 1963).

common law received into Nigeria through the general reception process previously described[1]. Secondly, in the southern states, the inclusion of two express provisions in the Criminal Code on the reporting of proceedings does not exclude the operation of the common law: for, as earlier explained[2], section 6 of the Criminal Code Act preserves the power of courts of record in Nigeria to apply the unwritten rules of contempt; and this jurisdiction is, in fact, the one most frequently invoked in practice.

The rules which govern the reporting of proceedings conducted in public differ radically from the principles which apply to the publicising of proceedings held in private; and it is accordingly proposed to deal separately - in due course - with each in turn. The antecedent issue, however, is when proceedings may properly be held in private in the first instance: and to understand this, it is first necessary to grasp the full importance of the principle of open trial.

## 11.3. The Importance of Open Trial and Full Reporting by the Media

It is a fundamental principle of common law that proceedings, in general, should be conducted in open court. In exceptional circumstances (as further explained below[3]) proceedings may

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1. See the section on the Sources of Nigerian Law, above.
2. See p 703, et seq.
3. See p 1010 et seq.

take place in private (either in camera or in chambers[1]); but the broad principle is clear: the public has a right to attend judicial proceedings and the media have a right freely to report such proceedings - this freedom resting on the principle that 'such publication is merely enlarging the area of the court and communicating to all that which all had the right to know'[2].

The reason underlying the 'open court' principle has been graphically stated by Bentham, as follows:

> '"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice .... Publicity is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'[3].

This passage was cited - with full approval and endorsement - by Lord Shaw of Dumferline in the leading case of Scott v Scott[4], in 1913. Here, the House of Lords unanimously confirmed the principle that justice should be administered in open court and that the media should have the right to communicate the conduct and outcome of judicial proceedings to the public at large.

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1. Proceedings in camera are conducted in court, but with the press and public excluded. Proceedings in chambers, as the term suggests, are conducted outside the normal courtroom in the private chambers of the presiding judicial officer. See C.J. Miller, Contempt of Court, London, 1976, p 212.

2. MacDougall v Knight, (1889) 14 App. Cas. 194, at 200, per Lord Halsbury.

3. See Scott v Scott, [1913] A.C. 417 (H.L.(E.)), at 477, where this passage is cited by Lord Shaw of Dumferline.

4. Ibid.

Derogations from this principle could be justified only in exceptional cases[1]; for 'publicity in the administration of justice ... is one of the surest guarantees of our liberties'[2] and restrictions on such publicity constitute 'an attack upon the very foundations of public and private security'[3].

The importance of open court proceedings has recently been reaffirmed by the House of Lords in Attorney-General v Leveller Magazine Ltd[4], where Lord Diplock declared:

> 'As a general rule the English system of administering justice does require that it be done in public .... If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this'[5].

Since then, the principle has again been emphasised by the House of Lords in Home Office v Harman[6]. Here, Lord Scarman -

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1. The exceptions are discussed further below.

2. Scott v Scott, supra, at 476, per Lord Shaw.

3. Ibid.

4. Attorney-General v Leveller Magazine Ltd and others; Attorney-General v National Union of Journalists; Attorney-General v Peace News Ltd and others, [1979] A.C. 440 (H.L.(E.)). This important decision is further discussed below.

5. Ibid, at 449 - 450

6. [1982] 2 W.L.R. 338 (H.L.(E.)), discussed further in Chapter Twelve below.

referring to the passage from Bentham cited above - pointed out that :

> '[w]hether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification'[1].

He continued :

> '[T]he common law by its recognition of the principle of open justice ensures that the public administration of justice will be subject to public scrutiny. Such scrutiny serves no purpose unless it is accompanied by the rights of free speech, i.e., the right publicly to report, to discuss, to comment, to criticise, to impart and to receive ideas and information on the matters subjected to scrutiny. Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case'[2].

More recently still, in R v Horsham JJ., ex parte Farquharson and another[3], the sanctity of the principle has been reiterated by Lord Denning, M.R. in characteristically graphic terms :

> 'It is of the first importance that justice should be done openly in public: that anyone who wishes should be entitled to come into court and hear and see what takes

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1. Ibid, at 356.

2. Ibid. The latter point is graphically illustrated by the 'thalidomide' litigation, discussed in Chapter Nine above.

   Lord Scarman's dicta are notable for their acknowledgement of the wide-ranging importance of unrestricted reporting and discussion of issues raised in judicial proceedings. It is accordingly, with respect, unfortunate that this passage forms part of what was a minority judgment. It is significant, however, that the importance of open trial and full publicity was also expressly acknowledged by Lord Diplock (at 344, ibid) and by Lord Roskill (at 363, ibid) - both part of the majority - so that it is clear that the re-affirmation of this principle forms part of the ratio of the House of Lords' decision.

3. [1982] 2 W.L.R. 430 (C.A.)

> place; and that any newspaper should be entitled to publish a fair and accurate[1] report of the proceedings - without fear of a libel action[2] or proceedings for contempt of court. Even though the report may be most damaging to the reputation of individuals, even though it may expose wrongdoing in high places, even though it may be political dynamite, nevertheless it can be published freely - so long as it is part of a fair and accurate report'[3].

## 11.4. The Rationale for Restricting Open Trial and Full Reporting in Certain Circumstances

In the light of the ringing affirmations of the importance of open trial described above, it may be queried whether there can ever be sufficient reason for conducting proceedings in private or restricting their reporting. It is nevertheless clearly recognised that this may indeed be appropriate in certain circumstances; and the reason for this has been graphically described by Viscount Haldane, L.C. in Scott v Scott[4]. Here, his Lordship emphasised that the 'chief object of Courts of justice must be to secure that justice is done'[5]; and he pointed out that :

> 'it may often be necessary, in order to attain this primary object, that the Court should exclude the public ... for it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the

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1. This requirement is further discussed below.

2. The law of libel relating to the reporting of court proceedings has previously been discussed. In essence, fair and accurate reports enjoy qualified privilege at common law (provided proceedings are public) and may be absolutely privileged under statute in certain parts of Nigeria. Some doubt attaches to whether reports of private proceedings are privileged at all. See Scott v Scott, infra, (note 4), at 452, per Lord Atkinson.

3. R v Horsham JJ., supra, at 452.

4. [1913] A.C. 417 (H.L.(E.))

5. Ibid, at 437.

> general rule as to publicity, after all only a means to an end, must accordingly yield'[1].

The same practical limitation has also been acknowledged by Lord Diplock in Attorney-General v Leveller Magazine Ltd[2]. Here, his Lordship - having stressed the general principle of open justice in the emphatic terms described above - went on to state that:

> 'since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule'[3].

The general principle of open trial - and the need for derogation from it in certain instances in order to serve the interests of justice - have thus both clearly been acknowledged. The question which remains shrouded in controversy, however, is the range of circumstance in which private proceedings may be appropriate: and it is to this contentious issue that consideration must now be given.

## 11.5. Open Justice and its Exceptions in Nigerian Law

The principle of open justice and the exceptions to it in Nigerian law are governed by both statute and common law; and both require separate consideration.

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1. Ibid, at 437 - 438.
2. [1979] A.C. 440 (H.L.(E.)).
3. Ibid, at 450.

11.5.1. Statutory regulation of the principle of open justice

Statutory regulation of the principle of open justice in Nigerian law is to be found principally in the Constitution of the country and in the guarantee it provides of the right to 'fair trial'. Thus, section 33 of the 1979 Constitution proclaims that :

> 'Whenever any person is charged with a criminal[1] offence, he shall unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal :
>
> Provided that -
>
> (a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of 18 years, the protection of the private lives of the parties to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;
>
> (b) if in any proceedings before a court or such a tribunal a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies[2] the court or tribunal that it would not be

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1. It is interesting to note that the constitutional guarantee is thus expressed to apply only to criminal proceedings, no mention at all being made of civil litigation. As regards the latter, the fundamental principle of common law requires that these, too, must be conducted in open court as a general rule (subject, however, to certain exceptions which are further described in due course).

2. This provision gives a clear discretion to the court to decide whether disclosure would be inimical to the public interest. Accordingly, it represents a marked departure from the previous rule, according to which a Minister (at Federal or State level) could certify - with conclusive effect - that certain matters ought not (in the interests of the state) to come to the knowledge of the public. See L.O. Adegbite, 'Reports of Parliamentary and Judicial Proceedings', in T.O. Elias, (ed.), Nigerian Press Law, London and Lagos, 1969, pp 87 - 108, p 99.

> in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter'[1].

In addition, the Criminal Procedure Act[2] lays down a general rule that 'the room or place in which any trial is to take place under [its provisions] shall be an open court to which the public generally may have access as far as it can conveniently contain them'[3]. This principle is, however, subject to certain exceptions, which entitle the 'judge or magistrate presiding over such trial ..., in his discretion, to ... exclude the public at any stage of the hearing on the grounds of public policy, decency or expedience'[4]; or 'where a person who in the opinion of the court has not attained the age of seventeen is called as witness in any proceedings in relation to an offence ... contrary to decency or morality to direct that all ... persons not ... directly concerned in the case, be excluded from the court during the taking of the evidence of such person'[5].

It is noteworthy, however, that no such order excluding the public 'shall ... unless specifically stated ... authorise the exclusion of bona fide representatives of a newspaper or news

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1. s 33(4), Constitution of the Federal Republic of Nigeria, 1979, emphasis supplied.
2. Cap 43 (Laws of the Federation of Nigeria and Lagos, 1958).
3. s 203, ibid.
4. Ibid.
5. s 204, ibid.

agency'[1]; and if such persons are expressly barred from the court, the judge or magistrate must 'record the grounds upon which such decision is made'[2].

Similar provisions are contained in the Criminal Procedure Code[3], applicable in the northern states. This provides that :

> 'The place in which any court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court, to which the public generally may have access, so far as the same can conveniently contain them'[4].

Again, the principle of 'open court' is not absolute: and a court is empowered to order, 'if it thinks fit, at any stage of any inquiry ... or trial ... that the public generally or any particular person shall not have access to or be or remain in such place'[5]. In terms of the Explanation to this subsection, this means that a court 'may exclude any witness from the court at any stage of the proceedings or may clear the court whilst a child or young person is giving evidence'[6]. This Explanation does not, however, set the limits within which exclusion may validly be ordered; but, on the contrary, provides no more than a guide as to the circumstances in which this may be done. It

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1. s 205(1), ibid.
2. s 205(2), ibid.
3. Cap 30 (Laws of Northern Nigeria, 1963).
4. s 225(1), ibid.
5. s 225(2), ibid.
6. Explanation to s 225(2), ibid.

should not therefore be seen as a limitation upon the very wide powers conferred on the court to exclude the public (in whole or part) whenever it 'thinks fit' to do so. It is interesting to note that these provisions make no express mention of press representatives; and it follows that no special privilege has been accorded them in the North.

The statutes are silent as to the principle of open justice in relation to civil proceedings; and the circumstances in which the public and press may lawfully be excluded from the hearing of civil litigation is accordingly governed by common law principles.

### 11.5.2 The principle of open justice and its exceptions at common law

The general rule of open trial at common law is clearly established, as is the further principle that private proceedings must be permitted in appropriate instances: and neither, accordingly, warrants further examination. However, the practical application of the latter principle (and the attempt to define the circumstances in which proceedings may legitimately be held in private) are matters of considerable difficulty; and must now be considered.

The leading authority on the issue is the House of Lords' decision in Scott v Scott[1]. Here, a nullity suit had, at the instance of the petitioner, Mrs Scott, been heard in camera. In

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1. [1913] A.C. 417 (H.L.(E.))

order to vindicate her reputation (in the face of her ex-husband's accusations), Mrs Scott had subsequently sent copies of the short-hand notes of the proceedings to, inter alia, his father and sister[1]. She was thereupon found guilty of contempt (for publicising proceedings in camera); and her appeal came, in due course, before the House of Lords - which was unanimous in allowing it. In the course of their judgments, the Lords enunciated a number of important principles regarding the circumstances in which proceedings may be held in private - as well as on the further question of the extent to which publication may thereafter be permitted[2].

As regards the first issue (the circumstances justifying private proceedings), it should be noted - at the outset - that the House experienced considerable difficulty in formulating precise principles. As observed by Earl Loreburn, '[i]t would require a treatise to expound the law upon ... th[is] subjec[t], and it would be a treatise without authority'[3]. Certain fundamental points do, nevertheless, clearly emerge from the judgment of the House.

The judgment thus acknowledges both the importance of open trial[4] and the need for derogation from this principle in certain circumstances[5]. It also emphasises that derogation is permitted only within the narrowest bounds; and thus acknowledges

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1. Ibid, at 431

2. This issue is examined further in due course.

3. Scott v Scott, supra, at 445.

4. See p. 1001 et seq.

5. See p 1040 et seq.

that private proceedings may be allowed only in the following circumstances :

> (i) in proceedings involving wards of court or the mentally disturbed[1] where the judge represents the Crown as parens patriae and the proceedings may properly be regarded as intra familiam[2];
>
> (ii) in proceedings involving secret processes, such as alleged patent infringements, where publicity would destroy the secret which the litigation was designed to protect[3]; and
>
> (iii) where the clearly of the court is necessary to prevent '[t]umult or disorder''[4].

The House further considered that privacy might be desirable in cases involving indecency, but was satisfied that this was not the rule of common law and that legislation was necessary to effect this[5].

The Lords further attempted to formulate some general principle to govern the residue of cases in which proceedings might properly be held in private: but experienced grave difficulty in doing so. Viscount Haldane, L.C. pointed out that the recognised exceptions to the general rule (as described above)

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1. The word 'lunatics' in fact used by the court appears somewhat anachronistic today.

2. Scott v Scott, supra, at 483, per Lord Shaw of Dumferline. Lord Shaw was here particularly concerned with the circumstances in which publicity regarding private proceedings may legitimately be curtailed. This, strictly, is a separate question: and is discussed in due course below. However, the two issues are also inextricably linked: and the criteria governing both are fundamentally the same.

3. Ibid.

4. Ibid, at 445, per Earl Loreburn

5. Ibid, at 485, per Lord Shaw; and at 447, per Earl Loreburn.

'are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done'[1]. He accordingly declared (in the passage earlier cited[2]) that :

> 'It may often be necessary, in order to attain its primary object, that the Court should exclude the public .... [for] it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all, only the means to an end, must accordingly yield'[3].

He also, however, took pains to emphasise that the burden of proving that this was essential (not merely convenient[4]) lies on the person seeking to displace the general rule, who must 'make up his case strictly ... [and] must satisfy the Court that by nothing short of the exclusion of the public can justice be done'[5].

Some disquiet at this notion was, however, expressed by the Earl of Halsbury, who declared that he wished 'to guard against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret'[6]. His

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1. Ibid, at 437.
2. See p 1005.
3. Supra, at 437 - 438.
4. Ibid, at 438.
5. Ibid.
6. Ibid, at 442.

main difficulty was that this principle was not 'a sufficient exposition of the law'[1] - and left too wide a margin of discretion to the individual trial judge. Accordingly, he 'hesitate[d] to accede to the width of the language'[2] - even though he was prepared to accept that there might indeed be other cases in which privacy could legitimately be enjoined.

Earl Loreburn attempted a somewhat different formulation. Having pointed out that it was 'impossible to enumerate or anticipate all possible contingencies'[3], he submitted that the principle underlying the various recognised exceptions is that the public may legitimately be excluded if 'the due administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court'[4]. He further suggested (in the context of nullity proceedings, at least) that the power to order a hearing in camera 'ought to be liberally exercised, because justice [would] be frustrated or [would] declin[e] if the Court [were] made a place of moral torture'[5].

Grave misgivings regarding this suggestion were, however, voiced by Lord Shaw, who warned that 'this ground is very dangerous ground'[6]. He acknowledged that the publicity attendant upon open trial may well deter 'sensitive suitors'[7] and 'witnesses

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1. Ibid.
2. Ibid, at 443.
3. Ibid, at 446
4. Ibid.
5. Ibid.
6. Ibid. at 485
7. Ibid .

of delicate feeling'[1] from coming to court; but emphasised that 'the concession to these feelings would ... tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure'[2].

It is difficult to distill any clear principle from these conflicting dicta. It seems that the Lords were prepared to accept that the category of 'exceptional cases' is not closed and that private hearing may be justified in circumstances other than the ones enumerated as well. But the guiding rule for determining the limits of such instances remains shrouded in uncertainty; and little further guidance is provided by the recent Lords' decision in Attorney-General v Leveller Magazine Ltd[3]. This, of course, is not surprising - given the fact that this question was not squarely before the court[4]. The clearest statement of principle is provided by Lord Scarman, who - having canvassed the conflicting dicta in Scott v Scott[5] - proceeded to affirm that a court may sit in private if the due administration of justice would otherwise be endangered; but that there must be 'material (not necessarily formally adduced evidence) made known to the court which would justify this conclusion'[6]. This, with respect, is no more precise than the formulations earlier attempted in Scott v Scott[7];

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1. Ibid.
2. Ibid.
3. [1979] A.C. 440 (H.L.(E.)).
4. See p 1033 below, where the facts of the case are explained.
5. Supra. The dicta in question are, of course, those cited above.
6. Attorney-General v Leveller Magazine, supra, at 471.
7. Supra.

and it thus remains extremely difficult - in all but the clearly recognised categories of exception - to determine when proceedings may properly be heard in private.

It is therefore fortunate that this problem is seldom encountered in Nigeria in practice. Thus, Adegbite points out that '[o]nly an insignificant percentage of judicial proceedings held in [Nigeria] take place in camera'[1]; and that the principle of open justice is generally applied. Whilst this is clearly to be welcomed, it also means that the Nigerian courts have had little opportunity to clarify the common law principles governing this issue: and the matter is therefore likely to present considerable difficulty when it arises for consideration.

Having thus analysed the circumstances in which the important safeguard of open trial may indeed be curtailed, it now remains to examine the issue which is of particular significance to the media: the extent to which they may report proceedings conducted either in public or private; and the obligations which rest upon them in this regard. Since public proceedings are undoubtedly the norm, it is proposed to begin this analysis by focusing on the rules relevant to the reporting of proceedings conducted in open court.

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1. Adegbite, op cit, p 100.

## 11.6. Reporting Proceedings Conducted in Public

Nigerian law governing the reporting of court proceedings conducted in public is derived from both statute and common law; and both sets of rules require separate examination.

### 11.6.1. Legislation regarding the reporting of public proceedings

The only statutory provision in Nigerian law regarding the reporting of judicial proceedings conducted in public is section 133(4) of the Criminal Code[1], applicable in the southern states. This renders it an offence (punishable by three months' imprisonment), ' while a judicial proceeding is pending, [to] make use of any speech or writing, misrepresenting such proceeding'[2].

The operation of this provision is illustrated by the case of Oni v Attorney-General of the Federation and others[3]. The proceedings arose out of the misreporting, by the Daily Express newspaper, of certain interlocutory proceedings before Mr Justice Taylor in the Lagos High Court. The article in question was headed '"Battle: Govt 'loses' round 1"'[4]; and it proceeded to describe - as if already authoritatively decided - a number of matters which were, in fact, still very much in issue

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1. Cap 42, (Laws of the Federation of Nigeria and Lagos, 1958)

2. s 133(4), ibid.

3. Suit No LD/739/70, reproduced by Chief Gani Fawehinmi, The Law of Contempt in Nigeria, (Case Book), Surulere, 1980, pp 213 - 215.

4. See Fawehinmi, ibid., p 213

in the substantive proceedings[1].

In proceedings for contempt under s 133(4) of the Criminal Code, Taylor, C.J. observed that 'th[e] statements [in the article] were wholly false and could have gained birth [only] in the fertile imagination of an ignorant, cheap publicity seeking and unintelligent reporter'[2]. He rejected the Australian authority[3] cited by counsel for the accused and referred with approval to various English decisions indicating (inter alia) that comments 'calculated to prejucide'[4] pending proceedings are contempts, irrespective of whether 'any Contempt of court was intended'[5]. In the view of the learned judge, the article -

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1. Ibid., pp 213 and 214. For example, the article stated that Mr Justice Taylor had held that the Federal Executive Council was not vested with the power to make laws - whereas this was one of the main questions in dispute: and was still to be resolved at the trial of the proceedings.

2. Ibid., p 214.

3. Ibid. Unfortunately, the Australian authority is not identified in the report, nor does Taylor, C.J. make altogether clear his reasons for rejecting it - apart from indicating that Australian precedents can be of little assistance in interpreting Nigerian legislation.

4. Ibid, citing In re Martindale, (1894) 3 Ch. 193, at 200, per North, J.

5. Ibid., citing the same judgment of North, J at 201. The relevance of these authorities is open to some question, as they are clearly concerned with publications which constitute contempt under the sub judice rule. S 133(4), however, speaks simply of 'misrepresenting' pending proceedings; and does not seem to require that the misrepresentation should have the effect of prejudicing particular proceedings.

with its various inaccuracies[1] - clearly fell within the ambit of s 133(4)[2]. In the light, however, of the apologies published by the newspaper and the lack of experience of the particular reporter, Taylor, C.J. was content merely to give the accused 'a severe caution and reprimand'[3] - but emphasised that he would not be so lenient if the offence were to be repeated.

### 11.6.2 Reporting public proceedings at common law

By virtue of section 6 of the Criminal Code Act[4], the Nigerian courts are not confined to the contempt jurisdiction expressly conferred on them by the Criminal Code, but may rely, instead, upon the unwritten rules of common law[5]. Furthermore, the Northern Penal Code contains no equivalent provisions regarding the reporting of court proceedings (as earlier noted): and the matter is clearly governed by the common law alone throughout the vast northern areas of the country. It follows that the common law requirements for the reporting of proceedings in open court have considerable significance in all parts of Nigeria; and that they accordingly merit careful examination.

#### 11.6.2.1. The report must be fair and accurate

Since the object of the rule conferring freedom to report proceedings in open court is to expand communication of what the

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1. Ibid., where Taylor, C.J. in fact went so far as to state that 'not a single paragraph of the article bears relation to the truth'.
2. Ibid., where Taylor, C.J. confirms that the article 'is well within the definition of contempt as contained in our Criminal Code'.
3. Ibid.
4. Cap 42, (Laws of the Federation of Nigeria and Lagos, 1958).
5. See p 703, et seq.

public has a right to know to a wider audience than the physical constraints of court premises permit, it is clearly 'most important that the public should have correct reports of what takes place in Court'[1]. A report need not, however, be accurate in every last detail provided it is substantially correct in content and tone.

The point is well illustrated by R v Evening News, ex parte Hobbs[2], where the defendant newspaper was alleged to have misreported the Recorder's summing up to the jury. His actual words had been:

> '"The evidence in the case is of an extraordinary character, and there can be no doubt, I should say - it is for you to judge - that Hobbs was a party to a gigantic fraud, as monumental and impudent a fraud as has ever been perpetrated in the course of our law"'.[3]

The newspaper's report was as follows:

> '"There can be no doubt, I should say, that Hobbs was a party to a gigantic fraud. It was as monumental and as impudent a fraud as, perhaps, has ever been perpetrated in the course of our criminal history". These words were used by the Recorder ... in his charge to the grand jury at the Old Bailey today'[4].

The report thus omitted the words underlined in the first of these passages: 'it is for you to decide'. However, since it

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1. See Re Certain Newspapers, Duncan v Sparling, (1894) 10 T.L.R. 353, per Cave, J.
2. [1925] 2 K.B. 158.
3. Ibid.
4. Ibid.

was clear that the Recorder had believed that the accused ought to be convicted (so that his direction was, in any event, highly improper), it followed that the report had not misrepresented the substance of his summing up. The 'fair and accurate' requirement was accordingly satisfied.

On the other hand, as recently emphasised in the Australian decision of Minister for Justice v West Australian Newspapers Ltd[1], general factual accuracy may not be enough, if the report is 'unfair either in its mode of presentation or in stressing unfavourable aspects of the proceedings or in accurately reporting some parts but omitting other parts of the proceedings'[2].

11.6.2.2. The report must be published contemporaneously with the proceedings

Whilst it seems that this is not a requirement at common law, it is interesting to note that it has been given statutory force in the United Kingdom in the Contempt of Court Act, 1981. This provides protection (against conviction under the strict liablity rule) to fair and accurate reports of legal proceedings which are published 'contemporaneously'[3]. It seems[4] that this

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1. [1970] W.A.R. 202.

2. Ibid., at 208, per Jackson, C.J. The facts, in brief, were that a man had been charged with murder for shooting a Perth shopkeeper and had been committed for trial on this charge as well as a number of others (including one involving the stealing of a rifle and ammunition). These various charges (plus convictions relating to the unlawful use of motor vehicles) were reported by the newspaper in a way which the Supreme Court held to be highly selective (through emphasis, in particular, on the theft of the rifle - which many readers would have linked with the murder charge). The article was therefore held to constitute a contempt.

3. See s 4(1), Contempt of Court Act, 1981.

4. See Halsbury's Statutes of England, 3rd ed., vol 51, p 501.

requirement is to be construed fairly widely and that the word has substantially the same meaning as in the law of libel: where it has been held to require that the report be published as soon as reasonably possible, bearing in mind the opportunities for preparation and the time of going to press or making the broadcast[1].

11.6.2.3. The report must be made in good faith

Though the matter is not entirely free from doubt, it seems that - at common law - the requirement of good faith is a separate and substantive one, so that 'an objectively fair report would not enjoy any immunity if its publication was in fact actuated by malice or improper motive'[2].

In the United Kingdom, statutory recognition of the importance of bona fides has been provided by the Contempt of Court Act, 1981, which provides similar protection to fair and accurate reports which are published 'in good faith'[3].

11.6.2.4 The report should not be prejudicial to pending proceedings

Whether this constitutes a requirement at common law is open to some dispute. There is early authority that it is not: and that a fair, accurate and bona fide report of proceedings in

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1. See ibid., and see also P. Lewis, (ed.), Gatley on Libel and Slander, 8th ed., London, 1981, para 633.
2. C.J. Miller, Contempt of Court, London, 1976, p 121.
3. s 4(1), supra.

open court may freely be published - irrespective of its prejudicial effect. Thus, for example, in Lewis v Levy[1] (in 1858), Lord Campbell, C.J. declared:

> 'In Curry v Walter[2] ... it was decided, about sixty years ago, that an action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual'[3].

On the other hand, it appears to be generally accepted that the media should not report aspects of proceedings conducted in the absence of the jury: for example, a "trial within a trial" to determine the admissibility of particular evidence[4], or the entry of pleas of guilty in relation to particular criminal charges[5].

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1. (1858) E.B. & E. 538; 120 E.R. 610.

2. (1796) 1 Bos. & P. 525.

3. Lewis v Levy, supra, at 557.

4. Thus, for example, it was stated by Lord Denning, M.R. in R v Horsham JJ, ex p Farquharson, [1982] 2 W.L.R. 430 at 450 that: 'at common law, whenever the judge sends the jury out, he expressly or impliedly directs that there should be no publication of what is said in their absence: such as when a question arises at a trial as to whether a confession is admissible or not- or whether evidence of similar facts can be given or not .... In such a case the judge sends the jury out and conducts a "trial within a trial" so as to decide the question. It is well understood by the press that there must be no publication of what takes place at the "trial within the trial"'. If there should be premature publication, however, this would constitute contempt of court, as confirmed in Attorney-General v Leveller Magazine Ltd, supra, at 450, per Lord Diplock.

5. Thus, for example, in R v Newcastle Chronicle and Journal Ltd, ex p Attorney-General, (unreported but approved by the Lords in the Leveller case, supra, at 456 - 457 and 466 - 467), publication of the fact that the defendant at a trial had pleaded guilty to four counts in an indictment during the course of her trial on the remaining 16 counts was held to constitute contempt.

The rationale for this restriction can only be that the reporting of these matters is likely to affects the minds of the jurors and thus to prejudice fair trial; and this well-recognised limitation thus clearly indicates that potential prejudice may provide legitimate grounds for suppressing fair and accurate reports of particular proceedings.

It seems also that postponement of publication may be ordered where a full report is likely to prejudice other proceedings which are pending. This is illustrated by R v Clement[1], where several men were charged with high treason (arising from the same circumstances) but were to be tried successively. '[B]efore the trial of the first man, Abbott, C.J. in open court prohibited the publication of the proceedings on that or any other day until the whole trial was brought to a conclusion'[2]. The Observer newspaper published a fair and accurate account of the first three days' proceedings (in breach of this order) and was held guilty of contempt[3]; and this was upheld by the Court of King's Bench[4].

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1. (1821) 4 B. & Ald. 218, approved by the House of Lords in Scott v Scott, [1913] A.C. 417 at 438 and 453.

2. This description of the proceedings is taken from the judgment of Lord Denning, M.R. in R v Horsham JJ, supra, at 449.

3. The editor was fined £500.

4. Miller, op cit, p 118, submits, however, that the reason for this was not fear of prejudice to the accused in the subsequent proceedings, 'but the creation of a situation in which witnesses in the later trials would be able to trim their evidence in the light of what they had read'; and he cites as authority the judgment of Bayley, J. (supra) at 230. In Lord Denning, M.R.'s view (in the Horsham case, supra), the salient fact was that 'all the trials could be regarded as one proceeding and it was only an order postponing publication - and not prohibiting it altogether'.

Similarly, in R v Poulson[1], where Poulson (during his examination-in-chief) 'had referred to his association with another man against whom separate proceedings in conjunction with Poulson himself were still outstanding, Waller, J. ... is reported as having said :

> "I do not see myself how the press can properly report this evidence without running the risk of being in contempt of this other trial. When we are dealing with someone who is subject to another trial, things have been said here which might be highly prejudicial to that trial, and therefore must not be published"'.[2]

There is some doubt, however, as to whether the courts have power, at common law, to order such postponement, or whether their authority is limited to issuing requests or directions to the media which are of questionable legal force[3]. Yet some regulation does appear necessary[4] - as illustrated by the case of one Albert Jones[5] who, in 1960, was convicted on a charge of raping a girl guide and then charged within three

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1. The Times, 4 January, 1974.
2. See Miller, op cit, p 118.
3. Thus, the Report of the Committee on Contempt of Court, ('the Phillimore Report'), Cmnd 5794, 1974, recommended (in the context of R v Socialist Worker Printers and Publishers Ltd, ex p Attorney-General, [1975] Q.B. 637, discussed further below) that legislation be introduced to eliminate this uncertainty.
4. This, of course, is on the assumption that media publicity does, in fact, influence jurors - a point which is by no means certain. It is worth noting in this regard the observations of Lord Denning, M.R. in R v Horsham JJ, supra, at 452, that 'at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folk who sit on juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the newspapers'.
5. His appeal against conviction on the subsequent charge of murder is reported sub. nom. Jones v Director of Public Prosecutions, [1962] A.C. 635 (H.L.(E.)).

months with the murder of another girl. The original trial had been widely publicised: so that, in fact, (as pointed out by Professor Street) 'the risk of the jury being prejudiced against Jones because of his preceding trial was much greater than was the risk in many of the convictions for contempt.... Yet the conduct of ... the Press, and the broadcasting agencies did not infringe the law of contempt'[1].

The problem, at common law, is particularly acute in relation to committal proceedings: where reports, though entirely accurate, may produce an especially lopsided impression as a result of the general practice whereby an accused reserves his defence until the trial itself[2]. Concern at the danger of prejudice thus engendered prompted Lord Ellenborough, C.J. in 1811 in the case of Fisher[3] to declare :

> 'The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is illegal'.[4]

This view did not, however, prevail[5]. In 1865, Fitzgerald, J. in R v Gray[6] - whilst acknowledging the risk of prejudice entailed in full reporting of committal proceedings - thought

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1. Harry Street, Freedom, the Individual and the Law, 3rd ed., Harmondsworth, Middlesex, 1972, p 166.
2. See Miller, op cit, p 113.
3. (1811) 2 Camp. 563; 170 E.R. 1253
4. Ibid., at 570.
5. See Miller, supra.
6. (1865) 10 Cox C.C. 184

it was outweighed by larger considerations, and stated:

> 'It has been said, and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly, but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison to the great public advantage given by the publicity'.[1]

Concern at the inadequacies of the common law in this regard - and at the extent of the 'inconvenience to individuals' it was prepared to countenance - came to a head in 1957, with the trial for murder of Dr Adams. At the committal proceedings, the prosecution led evidence 'of earlier deaths which they claimed were attributable to Dr Adams'[2]. They did not seek to adduce this highly damaging evidence at the trial but - in the meantime - the allegations had been widely publicised by the media in their reports of the committal proceedings.

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1. Ibid. The same approach is also reflected in later cases. Thus, in R v Sanderson, 31 T.L.R. 447, Low, J. 'described as "an extremely undesirable practice" the publication by the press of references to an accused's previous convictions given at the magistrates' courts in cases which were committed for trial [but] did not suggest that it was unlawful so to report'. Furthermore, in R v Armstrong, [1951] 2 All E.R. 219, Lynskey, J. - whilst pointing out that 'it is very undesirable that such information [i.e., relating to previous convictions] should be given' by the press, acknowledged that 'th[e] court has no power to compel the press' in this regard. Both authorities were approved in the judgment of Ackner, L.J. in R v Horsham J.J., ex p. Farquharson, supra, at 459.

2. Miller, op cit, p 113.

The dangers of "trial by newspaper" highlighted by these events prompted the establishment of the Tucker Committee: which, in 1958, recommended that 'severe restrictions be placed upon the publication of committal proceedings'[1]. These proposals (after considerable delay) were finally implemented in the United Kingdom in the Criminal Justice Act, 1967[2]; and are now to be found in the Magistrates' Courts Act of 1980[3].

Similar legislative reforms have not, however, been implemented in Nigeria as yet: and here the common law (with all its uncertainty and potential prejudice to fair trial) continues to apply. It must, however, be noted that the problem is less acute in Nigeria than was the case in England, by virtue of the practical consideration that jury trial is extremely rare in the former (unlike the latter[4]); and the risk of prejudice to fair trial through adverse media publicity is, of course, commensurately reduced[5]. It is nevertheless worth giving brief consideration to the United Kingdom reforms, for the insight they provide into the way in which Nigeria might - in future - seek to eliminate any residual

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1. See ibid., and see also the Report of the Departmental Committee on Proceedings before Examining Justices, ('the Tucker Report'), Cmnd. 479, 1958.
2. See s 3, Criminal Justice Act, 1967.
3. See s 8, Magistrates' Courts Act, 1980.
4. See the section on the sub judice rule at p 758 above, where the difference in the incidence of jury trial in Nigeria and England is further explained.
5. Where trial is by jury, there is inevitably a larger risk of prejudice through adverse publicity than where trial is conducted by trained and experienced judicial officers alone.

difficulties. This particular amendment is only one of a number of different reforms effected in the United Kingdom, however; and examination of the matter is accordingly postponed until other difficulties of the common law - which have likewise been thought ripe for amendment in England itself - have been described.

### 11.6.2.5 Publication must not undermine the administration of justice in general

A further alleged requirement of the common law is that reports of proceedings in open court must not undermine the administration of justice in general. The extent to which such publication is prohibited is, however, an extremely difficult issue; and the problem is perhaps best approached in the light of two recent English decisions - R v Socialist Worker, Printers and Publishers Ltd and anor, ex parte Attorney-General[1] and Attorney-General v Leveller Magazine Ltd[2]. Neither is entirely apposite (since, in both, publication went beyond what was strictly a 'fair and accurate report' of the proceedings[3]), but the guidance they provide is nevertheless of considerable significance.

In R v Socialist Worker , proceedings for contempt arose out of the giving of a direction by a trial judge (in a prosecution for

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1. [1975] 1 Q.B. 637 (D.C.)
2. [ 1979] A.C. 440 (H.L.(E.))
3. As further explained, the media reports in both instances went beyond merely quoting the pseudonyms given to witnesses in the course of trial and identified them by name. However, in the Leveller case, the Lords expressly confirmed that full reporting of all the evidence given by one such witness would not have constituted a contempt, even though this evidence was sufficient to reveal his identity. See the judgments of Lord Diplock, at 453, Viscount Dilhorne, at 455 (by implication) and Lord Russell, at 468, who stated: There can be no doubt that the publication in toto of [his] deposition was permissible'.

blackmail) that the two victims of the alleged blackmail (who both give evidence for the state) should be referred to as Mr Y and Mr Z. Before the end of the trial[1] an article appeared in the Socialist Worker, headed '"Y, oh Lord, oh why ..."'[2], which purported to give the names, addresses and certain particulars of the victims. The Attorney-General accordingly applied for the committal - for contempt of court - of the author and publishers of the article.

Lord Widgery, C.J., delivering the judgment of the court, began by briefly describing the blackmail trial in which the direction for anonymity had been given. The proceedings had been brought against one Janie Jones, who was charged (inter alia), with organising prostitution and with blackmailing 'Mr Y' and 'Mr Z' on the basis that 'she would disclose their activities with her girls unless suitable remuneration was provided'[3]. When the trial began, there was some discussion between the judge and counsel as to whether the witnesses should have their names disclosed or should be allowed to write these down, so that they 'would not be communicated to the press and the public

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1. There was no question, however, of the article being prejudicial to the outcome of the proceedings in hand, so as to constitute contempt under the sub judice rule. This was acknowledged not only by the Attorney-General in instituting the proceedings, but was also affirmed by Lord Widgery, C.J. (at 465), who considered it 'highly unlikely' that the jury in the Janie Jones case might have been affected by it.

2. R v Socialist Worker, supra, at 638.

3. Ibid., at 644.

present in court[1]. Counsel was apparently prepared to concede that the latter procedure might legitimately be adopted; and Lord Widgery, C.J. clearly considered that he was right to have done so. His Lordship pointed out that :

> 'all of us concerned in the law know that for more years than any of us can remember it has been a commonplace in blackmail charges for the complainant to be allowed to give his evidence without disclosing his name. That is not out of any feelings of tenderness towards the victim of the blackmail, a man or woman very often who deserves no such consideration at all. The reason why the courts in the past have so often used this device in this type of blackmail case where the complainant has something to hide, is because there is a keen public interest in getting blackmailers convicted, and experience shows that grave difficulty may be suffered in getting complainants to come forward unless they are given this kind of protection'.[2]

The trial judge then ruled that 'it would not be right for the full names [of the blackmail victims] to be given and ... that they ... should be referred to by letters'[3]. As regards the significance and ambit of this direction, Lord Widgery, C.J. was clearly of the view that it prohibited mention of the proper names of the witnesses within the court itself - but was not'expressed to go beyond the four walls of the Central Criminal Court'[4].

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1. Ibid.
2. Ibid.
3. Ibid.
4. Ibid., at 645. This is somewhat inconsistent with his ultimate ruling that the defendants were guilty of contempt on the ground, inter alia, that they had flouted the trial judge's authority. Inconsistencies of this kind exacerbate the difficulty of assessing the precise content of the common law rules.

The motive underlying the publication of the article - though perhaps not strictly relevant to the legal issues involved[1] - is interesting. The writer's aim was to draw attention to the absurdities of 'a system which allows the names of such witnesses as these to be concealed'[2]. He further deposed[3] that he was not aware of any order prohibiting publication having been made by the trial judge; and stated that, on the contrary, he had understood the judge to have made a request in this regard, which - on the basis of thirteen years of journalistic experience - he believed to have no legally binding effect[4].

Lord Widgery, C.J. - whilst recognising that a mere request or invitation not to publish might well have no legal effect - was quick to rejoin that 'what was done here by the judge unquestionably was to give a direction and not merely an invitation'[5]. Without making any further attempt to analyse the binding force of a 'direction', his Lordship then proceeded to extract from the decision of the Court of Appeal in Attorney-General v Butterworth[6] (involving the alleged victimisation of a witness after the close of proceedings[7]) two principles which

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1. Except, of course, to the extent to which it may be taken into account in assessing mens rea - the importance of which in determining liability is further examined below.
2. R v Socialist Worker, supra, at 645.
3. Ibid.
4. See ibid., at 646.
5. Ibid. Already, this seems inconsistent with his earlier dictum, described above.
6. [1963] 1 Q.B. 696 (C.A.)
7. Here, one G had given evidence before the Restrictive Practices Court, and had expressed views contrary to those of the union of which he was then branch treasurer. He was thereupon called to answer for his conduct; and, failing satisfactory reply, was stripped of his official positions within the union. This was held to constitute contempt because of its deterrent effect on future witnesses.

he considered helpful to the present case. The first is that conduct which amounts to 'a clear and deliberate affront to the authority of the court' constitutes a contempt. The second is that any act which 'pollutes the stream [of justice] today so that tomorrow's litigant will find it poisoned'[1] likewise constitutes a contempt. In his Lordship's view, the present article gave rise to a prima facie case of contempt on both these grounds. It did so on the first because the publication of the names of the two witnesses 'in defiance of the judge's directions' was a 'blatant affront to the authority of the court'[2]. It did so on the second ground as well because it was 'quite evident that if witnesses in blackmail actions [were] not adequately protected, this could affect the readiness of others to come forward in other cases'[3]; and this would clearly poison the stream of justice for future litigants. The respondents were thus clearly guilty of contempt: and were fined £350 each[4].

The second important decision in this context is Attorney-General v Leveller Magazine Ltd[5], which arose out of the prosecution of three defendants for offences under the Official Secrets Acts. During the committal proceedings, the prosecu-

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1. Attorney-General v Butterworth, supra, at 725, per Lord Donovan. Lord Widgery, C.J. was satisfied that these were the two grounds on which the case had been decided: and placed particular emphasis on the second.

2. R v Socialist Worker, supra, at 649.

3. Ibid, at 650.

4. The other members of the Court of Appeal concurred in this judgment. The decision is open to criticism in a number of respects - but principally as regards the first ground of contempt relied upon. Thus, the Court of Appeal gave insufficient consideration to the extent to which a judge may validly issue an order regarding publication which is indeed binding outside his court. This is further discussed below.

5. [1979] A.C. 440 (H.L.(E.))

tion applied for (and obtained) permission for a particular witness - on grounds of national security - to be referred to simply as 'Colonel B' and for his full name to be written down and shown only to the court, the defendants and their counsel. During cross-examination, however, Colonel B gave the official name and number of his army unit and stated that his posting to it was recorded in a particular issue of 'Wire' magazine, a service journal available to the general public. He thereby effectively disclosed his identity to anyone prepared to take the simple step of obtaining a copy of the relevant issue. No objection to the giving of this evidence was raised by either the prosecution or the court. The magazine Peace News published these two pieces of information about Colonel B thus 'elicited in open court' in November 1977 and subsequently disclosed his name as well. Two other magazines, The Leveller and The Journalist also published his name: and the Attorney-General sought the committal for contempt of those responsible for publication. The Divisional Court found the respondents guilty of contempt; and they appealed to the House of Lords, contending, inter alia, that the magistrates had no power to issue a ruling binding outside the four walls of their court - and pointing out that their motive in publishing had been simply to demonstrate the absurdity of restraining publication in such circumstances.

The House of Lords, in a long and complex judgment[1], in which

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1. Full analysis of this decision lies, unfortunately, outside the scope of this study. Apart from a number of internal inconsistencies in the judgments, the most notable feature of the decision is the lack of certainty it betrays as to whether a court does indeed have the power to make a binding ruling regarding publication.

five separate concurring opinions were delivered, held that the appeal should be allowed. They did so on two main grounds: first, that Colonel B had, in any event, effectively 'blown the gaff' regarding his identity by his own evidence[1] and, secondly, that the certainty required for a criminal conviction was lacking[2].

From these two decisions (notwithstanding their occasional inconsistencies and manifest uncertainties[3]), certain important principles of common law do clearly emerge, as explained below.

First, the courts do have power to curtail publication regarding proceedings in open court where this is necessary for the proper administration of justice: either in relation to the particular proceedings or in the long term. This is confirmed

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1. Attorney-General v Leveller Magazine Ltd, supra, at 453 (per Lord Diplock), at 456 (per Viscount Dilhorne) and at 468 (per Lord Russell of Killowen).

2. Ibid, at 461 (per Lord Edmund-Davies) and at 474 (per Lord Scarman). Thus, Lord Scarman (for example) drew attention to the uncertainty regarding the nature of 'ruling' issued by the magistrates and stated: 'If, upon its proper interpretation, the "ruling" was no more than an indication or request, publication would be no contempt' (at 473). In the circumstances, however, he remained 'unsure as to the nature and object of the ruling' (ibid.). Accordingly, the Crown and the examining justices had failed to 'make clear what they were seeking to do or upon what grounds the court was being asked ... to act. That certainty which the criminal law requires before a man can be convicted of a criminal offence [was accordingly] lacking'.

3. See, for example, Lord Scarman's doubts (in n 2 above) as to the effect of the ruling. His assertion that, in the absence of it having binding force, there would be no contempt is inconsistent with his earlier dictum (at 471 - 472) that it is a 'misconception' to regard this kind of contempt 'as being an offence because it is the breach of a binding order'.

in the judgment of Lord Widgery, C.J. in R v Socialist Worker[1] (being implicit in his finding that the publication constituted a contempt because of its tendency to deter other blackmail victims from coming forward to give evidence[2]) and in each of the judgments of the House of Lords in the Leveller case[3]. Thus, despite differences in formulation[4] and emphasis[5], the principle seems to be established beyond all doubt by these decisions.

Secondly, the fact that a court has issued a ruling against publication does not necessarily mean that disobedience of the ruling will constitute contempt. Something more than mere disobedience must be shown: and hence it must be estab-

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1. [1975] 1 Q.B. 637 (D.C.).

2. Ibid, at 652.

3. See Attorney-General v Leveller Magazine Ltd, supra, at 452 (per Lord Diplock), at 458 (per Viscount Dilhorne), at 465 (per Lord Edmund-Davies), at 467 (per Lord Russell) and at 471 (per Lord Scarman).

4. Thus, for example, Viscount Dilhorne (at 458, ibid.) believes that the power originates in the court's inherent jurisdiction to adopt its own rules of procedure; and merely suggests (through the examples he cites) that the power arises where this is necessary for the proper administration of justice.

5. Contrast, for example, Lord Russell's implicit confirmation of the principle (at 467 and 468) with the detailed treatment of Lord Diplock (at 452) and with the requirement emphasised by Lord Scarman (at 473) that there must be material adduced to the court to prove the restriction necessary for the proper administration of justice: even though such 'material' need not amount to evidence in the strict sense of the term.

lished that publication is inimical to the proper administration of justice[1]. Thus, the first principle described above - that restriction must be necessary for the proper administration of justice - is not merely one of a number of possible grounds for restricting publication, but provides (on the contrary) the sole legitimate justification for so doing.

Thirdly, although the issue of such a ruling[2] is strictly irrelevant to the question whether publication can validly be curtailed, it may nevertheless be desireable in the interests

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1. This is most clearly stated by Lord Edmund-Davies, at 464. However, it is also implicit in the fact that all of their Lordships either left open, or expressed doubts as to, the binding force of such rulings per se, but nevertheless clearly considered this ultimately irrelevant. See, thus, the judgment of Lord Widgery, C.J. in the Socialist Worker, supra, at 650, where his Lordship stated that the precise ambit of the trial court's ruling was irrelevant to the 'real vice' of the publication - its deterrent effect on other potential witnesses in blackmail prosecutions. See also - in the Leveller case, supra - the judgment of Lord Diplock (at 451) where his Lordship left open the question of the court's power to issue a binding directive against publication; and that of Viscount Dilhorne (at 456) where he declares that the English courts have no such power. See also the statement by Lord Russell (at 468) that the crucial question is whether there has in fact been an improper interference with the administration of justice - not whether there has been disobedience of an order binding on the alleged contemnor. See also the judgment of Lord Scarman (at 471 - 472) where he too confirms that the essence of the offence is interference with the course of administration of justice.
   It must, however, also be acknowledged that this is one of the most controversial issues canvassed in the various judgments; and that these reveal considerable uncertainty and inconsistency in this regard. It is not proposed to analyse these at greater length, however, as (it is submitted) the overall principle is nevertheless sufficiently clear.

2. That is, a ruling that a witness should be identified by pseudonym alone, with the express (or implicit) concomitant that his identity should not be disclosed in reports by the media of the proceedings.
   As regards the effect of such rulings, see n 1 above.

of certainty[1].

Fourthly, mens rea is not a relevant consideration, in the sense that it need not be shown that those responsible for publication intended thereby to undermine the proper administration of justice in any way[2]. However, knowledge on the part of the publisher of the "special treatment" accorded certain evidence (such as permitting the use of a pseudonym) is apparently required[3].

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1. See Attorney-General v Leveller Magazine Ltd, supra, at 453 (per Lord Diplock), 465 (per Lord Edmund-Davies) and 469 (per Lord Russell.

2. It was apparently accepted by the courts in both cases that the underlying motivation for publication was to draw attention to the absurdity of insisting on anonymity in such circumstances. As regards R v Socialist Worker, see p 1032 above; and, in the context of the Leveller decision, see the judgment at 448, where Lord Diplock points out that the motive allegedly underlying the publication was simply to 'ridicule the notion that national safety needed to be protected by suppression of the colonel's name'.
This made no difference, however, to the publishers' liability for contempt. As stated by Lord Russell (at 468): 'Their motive [was] irrelevant to guilt if they intended to do that which amounted in law to interference with the due administration of justice'.

3. Thus, Lord Diplock (at 452), stressed the need for awareness of such a ruling, stating that 'the doing of ... an act with knowledge of the ruling and of its purpose constitutes contempt of court'. See also the judgment of Viscount Dilhorne (at 458), to the effect that 'a person who seeks (emphasis supplied) to frustrate what the court has done may well be guilty of contempt'. See also the declaration by Lord Scarman (at 473) that a court order or ruling may be 'the foundation of contempt proceedings against any person who, with knowledge of the order, frustrates its purpose by publishing the evidence kept private'. (Emphasis again supplied). Lord Edmund-Davies goes further (at 466) to suggest that 'constructive knowledge' of such an order may be all that is necessary - at least where the publisher is a large commercial concern and should therefore have the means of establishing whether such an order has in fact been made. He thus asserts that, where one is concerned 'not with improper publication by a private individual ... but with people controlling or connected with powerful organs of publicity who may be motivated mainly by the desire to boost sales ... [i]t is incumbent upon [the latter] to ascertain what has happened in court. They have the means of doing this, and ... cannot be heard to complain that they were ignorant of what had taken place'.

## 11.7. Reporting Proceedings Conducted in Private

It remains to examine the rules governing the reporting of proceedings conducted in private. The circumstances in which departure from the general principle of open justice is legitimate have previously been described; and will not be reiterated here. It may be recalled, however, that this issue is one of great complexity at common law; and it is accordingly somewhat disconcerting to note that the further question of the extent to which private proceedings may be reported is one of even greater difficulty.

In the southern states of Nigeria, the matter is governed - to some extent - by section 133(5) of the Criminal Code[1]. This provides, in succinct and emphatic terms, that '[a]ny person who ... publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private'[2] shall be guilty of an offence and punishable by three months' imprisonment. The common law - with all its complexity - nevertheless continues to apply in the South by virtue of section 6 of the Criminal Code Act which (it will be recalled[3]) preserves the power of courts of record to rely instead on the unwritten law of contempt.

The northern Penal Code[4] contains no provision equivalent to s 133(5); and in the northern states, therefore, the reporting of proceedings *in camera* is governed *in toto* by common law rules.

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1. Cap 42 (Laws of the Federation of Nigeria and Lagos, 1958).
2. s 133(5), *ibid*.
3. See p 703, *et seq*.
4. Cap 89 (Laws of Northern Nigeria, 1963).

Common law principles are accordingly of great significance in this context: but the attempt to formulate their content is fraught with difficulty. As Miller[1] has pointed out, the gamut of opinion on the extent to which the common law prohibits the reporting of proceedings in private is wide indeed. 'At one extreme the view ha[ s] been expressed that since proceedings in chambers [are] held in private:" n[o]report [even] as to the facts or parties in particular cases may be published"'[2]. In addition, it has further been warned that newspaper articles merely speculating as to the nature of evidence given in camera may constitute contempt[3]. On the other hand, however, in Scott v Scott[4], the House of Lords emphatically declared that 'even if the High Court had had jurisdiction to hear [the] nullity suit in camera ... the subsequent publicising of the proceedings would not have been a contempt'[5]. However, the judgments of their Lordships in the case also betray an uncertainty (as to the limits within which publicity may legitimately be restricted) equal if not greater to that displayed by them in

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1. Op cit.

2. Ibid, p 212, citing Lord Hewart, C.J. in a Direction of 27 May 1932. (See [1932] W.N. Misc. 185).

3. See Lord Widgery's statement (in The Times, 17 June 1971) that the purpose of proceedings in camera is 'to prevent publicity being given to what happens in court' and that it may be 'just as damaging for information of that kind to leak out as it is to have the representatives of the press present and taking their notes at the time'; and 'even more serious if people can let themselves speculate as to what may or may not be going on in the courts during periods when they are in camera'. (Emphasis supplied). Accordingly, he 'wish[ed] to bring to the notice of the press that [such speculation] is irregular and a potential contempt of court'.

4. [1913] A.C. 417 (H.L.(E.))

5. Miller, supra, p 213

relation to the antecedent question of when proceedings may validly be held in private[1].

Thus, Earl Loreburn described the limits of the power 'to prevent or punish disclosure of what has taken place in camera after the hearing is over [as] almost an uncharted sea'[2]. He pointed out that 'an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity'[3]; and was accordingly convinced that '[t]here must be some power to prevent that'[4]. Confining himself for the moment to 'cases of secret process'[5], it appeared that 'the jurisdiction to impose silence ... must be commensurate with the purpose for which the jurisdiction exists'[6]. In the context of nullity or divorce cases, it '[might] well be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing'[7]. But his Lordship balked at the notion that 'all subsequent publication [could therefore] be forbidden'[8] - for this would result in an 'unwarrantable

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1. See p 1011 et seq.
2. Scott v Scott, supra, at 447.
3. Ibid.
4. Ibid.
5. Ibid, at 448.
6. Ibid.
7. Ibid.
8. Ibid.

interference with the rights of the subject'[1]. He was accordingly satisfied that the courts do not possess the power to enjoin perpetual silence regarding proceedings in private; and that '[t]he jurisdiction must ... be limited to wilful and malicious publications going beyond the necessary'[2].

Lord Atkinson concurred that a hearing in camera does not, ipso facto, impose an obligation to maintain perpetual secrecy regarding the proceedings. He acknowledged that reporting might legitimately be restricted in patent and analogous cases, where publication of the proceedings would defeat 'the whole object of [the] suit'[3]. Further than this, however, he was not prepared to go - nor could he find any authority to support the proposition[4]. In his view, an order (that proceedings be held in private) was 'spent when the case terminated, and had no further operation beyond that date'[5]; for - if this were not the rule - a 'rather injurious result might follow'[6], and it would become impossible to review 'the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of fact or law'[7].

Lord Shaw of Dumferline expressed particular concern at the derogation from the rights of the citizen implicit in the notion that perpetual silence might be imposed on proceedings in private[8].

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1. Ibid.
2. Ibid.
3. Ibid, at 450
4. Ibid, especially at 452 - 453.
5. Ibid, at 453
6. Ibid, at 463
7. Ibid.
8. Ibid, especially at 476 - 478.

He emphasised that once '[j]ustice [had] been done [in public or private] and its task [was] ended ..., [t]o extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing ... [would] be an unwarrantable stretch of judicial authority'[1]. Accordingly, he was prepared to acknowledge only three exceptions to the general rule regarding the right to publish - and then to allow these exceptions to operate only for so long as was commensurate with the object of the proceedings[2]. Thus, reporting might legitimately be restricted in relation to both wardship and 'lunacy' proceedings, which 'are truly private affairs'[3]; and as regards inventions and other secret processes where publicity would 'destroy that very protection which the subject seeks at the Court's hands'[4]. Even in these instances, however, his Lordship was not prepared to accept that the restriction on reporting should last for ever. On the contrary, 'when respect has been paid to the object of the suit, the rule of publicity may be resumed'[5]; and - in the context of trade secrets, for example - no proceedings for contempt of court should lie against 'a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property'[6].

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1. Ibid, at 484.
2. Ibid, at 482 - 483.
3. Ibid, at 483.
4. Ibid.
5. Ibid.
6. Ibid. In the context of wardship and lunacy proceedings, there was no principle which would 'entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane - after he had fully recovered his sanity and his liberty - to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity'.

It seems then (from the various dicta of the House of Lords in Scott v Scott) that the fact that proceedings are held in private does not necessarily mean that they cannot be reported after their termination. There are three clearly recognised exceptions to the general rule of publicity in terms of which reporting of wardship, lunacy[1] and patent[2] proceedings may be restricted for as long as this is necessary to prevent defeat of the object of the suit. As a general principle, however, the fact that proceedings have been conducted in private does not mean that they cannot thereafter be reported.

A measure of further guidance as to the common law rule in this regard is also to be gleaned from the recent House of Lords' decision in Attorney-General v Leveller Magazine Ltd[3]. Here, Lord Edmund-Davies - having reviewed the relevant authorities[4] - concluded that :

> 'what appears certain is that at common law the fact that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said or done behind closed doors) did not of itself and in every case necessarily mean that publication thereafter constituted contempt of court'.[5]

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1. This outmoded common law term is used - with due apology - because it is not only succinct but is also the term used by the Lords in this case.

2. The word 'patent' is here used as a shorthand expression for all proceedings of an analogous nature involving confidential information.

3. [1979] A.C. 440 (H.L.(E.)).

4. Ibid, at 464 - 465. Those cited are Scott v Scott, supra, cf R v Davies, ex parte Delbert-Evans, [1945] K.B. 435 at 446, and s 12 Administration of Justice Act, 1960. (This statute is further examined in due course).

5. Ibid, at 465.

His Lordship proceeded to explain that :

> '[f]or that to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future'.
> [1]

It thus needs little emphasis that the common law in this regard is far from being either certain or clear. In the United Kingdom, an attempt has accordingly been made to reduce its complexities through legislation.[2] Thus, section 12 of the Administration of Justice Act of 1960 now specifies various circumstances in which the reporting of proceedings held in camera will constitute contempt. This enactment, of course, forms no part of Nigerian law, but nevertheless merits some examination to show the nature of the changes which Nigeria might see fit to introduce. However, this innovation in English law is only one of three major reforms effected in the United Kingdom in the context of reporting court proceedings: and all three now warrant some consideration.

## 11.8. Reform of the Common Law in the United Kingdom

In the United Kingdom, an attempt has been made to reform the common law in three important respects. Thus, legislation has been introduced to regulate the reporting of committal proceedings; to specify the basis on which reports of trial proceedings in open court may be postponed or restricted; and to clarify

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1. Ibid.
2. There is considerable controversy as to whether the legislation has indeed replaced the common law: or whether it is still necessary to refer to the common law (with all its uncertainties), as further explained in due course.

the extent to which proceedings in private may be made public.

11.8.1. Reform of reporting of committal proceedings

It will be recalled that the common law is uncertain regarding the question whether reports of committal proceedings may be restricted in order to safeguard the ultimate fair trial of an accused. Concern at an apparent lacuna in the law prompted the establishment of the Tucker Committee, whose recommendations for 'severe restrictions' on the reporting of committal proceedings[1] were finally implemented in the Criminal Justice Act, 1967, now replaced (as regards these provisions) by the Magistrates' Courts Act of 1980.

Section 6 of the Magistrates' Courts Act, 1980 (the counterpart of section 3 of the 1967 statute) renders it an offence (punishable by fine not exceeding £500[2]) to 'publish ... a written report, or to broadcast ... a report, of any committal proceedings ... containing any matter other than that permitted by subsection (4)'[3]. Subsection (4) restricts the information which may be published or broadcast to specified minimum details - such as the names, addresses and occupations of the parties and witnesses and the ages of the accused and witnesses[4]; the offence or offences ... with which the accused is or are charged'[5]; 'any decision of the court to commit the accused or any of the accused for trial'[6]; and 'any arrangements as to bail on committal or

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1. Report of the Departmental Committee on Proceedings before Examining Justices, ('the Tucker Report'), Cmnd 479, 1958, especially at paras 32 and 33.
2. s 8(5), Magistrates' Courts Act, 1980.
3. s 8(1), ibid.
4. s 8(4)(b), ibid.
5. s 8(4)(c), ibid.
6. s 8(4)(e), ibid.

adjournment'[1].

Ironically, this provision may give rise to further anomalies: as illustrated by proceedings (under the original section 3 of the Criminal Justice Act 1967 which is in identical terms[2] with the new subsection (4)), involving the Eastbourne Herald newspaper, which had published a report of committal proceedings in which it specified that the defendant (who was charged with unlawful sexual intercourse) had appeared in court 'bespectacled and dressed in a dark suit' and that he had been 'married at St Michael's Church on New Year's day'[3]. The editor and proprietors of the paper were found guilty of contravening the statute and were fined a total of £200[4].

It thus appears that the legislation prohibits the report of any details other than those enumerated in subsection (4): and does so 'quite irrespective of whether or not the details are potentially prejudicial in nature'[5]. The absurdity of this is emphasised by Miller[6], who submits that it would have been preferable :

> 'to have enacted a simple provision whereby it [would ] no longer ... be a defence to the publisher of prejudicial matter to show that the publication was a fair and accurate report of committal proceedings'.[7]

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1. s 8(4)(h), ibid.
2. Some consequential amendment has been effected, but - in substance - the legislation remains the same.
3. See Miller, op cit, p 114.
4. Plus costs of £37.50. See Miller, ibid.
5. Ibid.
6. Ibid.
7. Ibid, emphasis supplied.

This, clearly, would have the benefit of greater flexibility and - even more importantly - would strike at the heart of the matter by making it clear that the statutory derogation from the common law principle applies only to material which is prejudicial. Unfortunately, however, advantage was not taken of the opportunity provided by the replacement of the original section 3 of the Criminal Justice Act (by section 8 of the Magistrates' Courts Act, 1980) to effect this reform.

The Criminal Justice Act 1967 provided one exception to the general restriction on the reporting of committal proceedings. Thus, under section 3(2), a magistrate's court was empowered to lift the reporting restrictions on the application of the defendant (or one of the defendants). This provision was incorporated in recognition that 'in exceptional situations, a defendant ... might have an interest in the dissemination of news of his predicament [and] ... might have grounds to believe that amongst those who read the published accounts there would be some who could provide evidence favourable to him'[1]. The provision gave no discretion to the court, however, in deciding whether it should accede to the request (it being clear that the court was bound to do so as soon as the application was made): nor did it take into account the position of any co-defendants of the applicant, who might wish the restrictions to continue in force. These deficiencies in the legislation were accordingly countered by the introduction (in the Criminal Justice (Amendment) Act, 1981) of a new discretionary

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1. See R v Horsham J.J., ex parte Farquharson, [1982] 2 W.L.R. 430 (C.A.), at 454, per Shaw, L.J.

power to weigh 'the interests of justice' in deciding whether to grant such an application. This discretion arises only, however, where the applicant is one of a number of accused - and one or more of the latter object to the lifting of restrictions. The new provision[1] thus states :

> 'Where in the case of two or more accused one of them objects to the making of an order under subsection (2) above[2], the court shall make the order if, and only if, it is satisfied, after hearing the representations of the accused, that it is in the interests of justice to do so'.[3]

The statute thus confers a wide-ranging discretion on the magistrates' courts, for it makes no attempt to specify the criteria which should be taken into account in deciding whether or not to order the lifting of restrictions. It has been suggested that the justices may take into account only the 'interests of justice' as they affect the particular defendants[4]; but - *prima facie* - there is nothing to indicate conclusively that this is so: and it may well be legitimate for the courts to take into account far wider implications: such as the potential

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1. This provision has been inserted as section 8(2A) of the Magistrates' Courts Act, 1980 by virtue of sections 1(1) and (2), Criminal Justice (Amendment) Act, 1981.
2. That is, an order for the lifting of reporting restrictions.
3. s 1(2), Criminal Justice (Amendment) Act, 1981. See n 1.
4. See R v Horsham J.J., supra, at 455, per Shaw, L.J. The reason for this, in Shaw, L.J.'s view, is that - in terms of the provision - 'only [the defendants] are entitled to make representations to the court in this regard'. This may be so: but it would not seem to preclude the defendants asking the court to take into account wider implications of the kind mooted in the text (nor, indeed, to prevent the court from considering such factors, *ex mero motu*). Shaw, L.J.'s dictum was also *obiter*, as the order lifting restrictions in the case had, in any event, been made pursuant to the non-discretionary power originally conferred by the legislation.

effect of lifting restrictions on the willingness of prosecution witnesses to come forward with their evidence in future cases.

### 11.8.2. Reform regarding postponement and restriction of reporting of trial proceedings in open court

It will be recalled from the discussion of the Clement[1] and Poulson[2] cases above, that some doubt attaches to the capacity of a court, at common law, to order the postponement of reporting of proceedings in open court. In addition, as graphically demonstrated by the Socialist Worker[3] and Leveller[4] decisions, there is considerable controversy as to the power of a court to prohibit the reporting of specified items of evidence, such as the identity of a prosecution witness. An attempt has now been made - in the Contempt of Court Act, 1981 - to resolve these difficulties.

The first section of the Act of relevance in this regard is section 4(2), which provides :

> 'In any such proceedings [i.e., legal proceedings in open court] the court may, where it appears necessary for avoiding a substantial risk of prejudice[5] to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any

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1. (1821) 4 B. & Ald. 218.
2. The Times, 4 January, 1974.
3. [1975] 1 Q.B. 637 (D.C.).
4. [1979] A.C. 440 (H.L.(E.)).
5. Cf. s 2(2) of the Act which, in the context of the sub judice rule, speaks of 'substantial' risk of 'serious' prejudice.

> part of the proceedings, be postponed for such period as the court thinks necessary for that purpose'.[1]

This provision - which appears clearly designed to cater for situations such as those in the cases of Clement[2] and Poulson[3] - does little more than reiterate the fundamental common law principle that curtailment of full reporting may be justified in the interests of the proper administration of justice. It does, however, further specify that this must appear 'necessary' in order to avoid a 'substantial' risk of prejudice. Neither word is defined, but it seems that 'substantial' must bear the same meaning as in section 2(2) of the Act (previously discussed in the context of sub judice publication[4]) and that 'necessary' carries the same interpretation as ascribed to it by the European Court of Human Rights in the 'thalidomide' case[5] and accordingly connotes a 'pressing social need'[6].

The effect of section 4(2) has already been the subject of judicial determination by the Court of Appeal: and the views of the court are accordingly canvassed in outline below, for the further light they throw on the significance of this statutory reform. The proceedings in question are R v Horsham J.J., ex parte Farquharson[7], which arose out of the prosecution

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1. s 4(2), Contempt of Court Act, 1981.
2. Supra.
3. Supra.
4. See p 828, above.
5. Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245.
6. Ibid, para 59. See Halsbury's Statutes, op cit, Vol 51, p 501.
7. [1982] 2 W.L.R. 430 (C.A.)

of four defendants for offences involving the export (or attempted export) of arms and ammunition. One of the defendants asked for the lifting of restrictions on the reporting of the committal proceedings - and this was duly ordered by the justices who (under section 8(2) of the Magistrates' Courts Act, 1980, as then formulated) had no discretion to refuse the request[1]. The Contempt of Court Act 1981 came into force on 27 August 1981; and when the committal proceedings began in October of that year, the accused (who clearly no longer desired full reporting) applied for an order postponing the reporting of the proceedings (under section 4(2) of the new Act) on the ground that 'the details of the case that were going to be aired in the committal were of a highly prejudicial nature and likely to inflame people's feelings because of the political and social implications ... of the case, namely, the political assassination side'[2]. The justices accordingly made an order '"prohibiting reporting of <u>any</u> part of the proceedings until the commencement of any trial hearing"'[3]. This provoked an outcry from the press, who contended that it brought the day of 'secret courts' so close as to be 'barely a step away'[4]. Local journalists, assisted by the National Union of Journalists, applied to the High Court to quash the magistrates' order. The High Court did so; and remitted the matter to the justices for re-consideration - but, in the meantime, prohibited further reporting of the case. The journalists thereupon appealed to the

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1. See p 1048.
2. <u>R</u> v <u>Horsham J.J.</u>, <u>supra</u>, at 445.
3. <u>Ibid</u>, emphasis supplied.
4. <u>Ibid</u>.

Court of Appeal, and the Horsham Justices and Customs and Excise Commissioners cross-appealed (challenging the order of the Divisional Court[1]).

The Court of Appeal was unanimous in ruling that both appeals should be dismissed[2] - but the reasons for so doing expressed by the three Appeal judges vary greatly and thus generate a judgment of considerable complexity. Full examination of the decision accordingly lies outside the scope of this study: and it is proposed to do no more than focus brief attention on some of the more important aspects of the decision.

First and foremost, it should be noted that the Court of Appeal was unanimous[3] in ruling that the blanket prohibition on reporting imposed by the magistrates went too far; and in emphasising that an order for postponement should only be made when necessary and with due regard for the 'great importance of the public interest in having justice done in open court with the press able to publish a fair and accurate report of what takes place'[4].

Secondly, the judgment provides little guidance as to the circumstances in which an order for postponement of reporting may legitimately be made. In the view of Lord Denning, M.R., this may only be done in those instances in which a report would, at common law, have constituted a contempt'[5]. Accordingly, it

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1. Ibid, at 443 - 444.
2. Ibid, at 453 (per Lord Denning, M.R.), 456 (per Shaw, L.J.) and 465 (per Ackner, L.J.).
3. Ibid, (per Lord Denning, M.R. and Shaw, L.J.) and at 464 (per Ackner, L.J.).
4. Ibid, at 453 (per Lord Denning, M.R.).
5. Ibid, at 449.

could only be done to prevent prejudice to forthcoming related proceedings (as in the Clement and Poulson cases[1]), or to prevent the disclosure of evidence the admissibility of which had been the subject of a "trial within a trial"[2]. The important difference introduced by the new provision, in Lord Denning's view, was that it made it incumbent upon the courts to specify - by means of express orders - what should not be published: failing which the media were free to report at will (though subject, of course, to the requirements of accuracy and good faith).

Whether the principle thus enunciated by Lord Denning, M.R. forms part of the ratio of the decision is open to some doubt, however, as Shaw, L.J. gave no consideration to this issue; whilst Ackner, L.J. emphasised (contrary to Lord Denning's view) that the legislature, in enacting section 4(2), could not have intended 'to revive all the old uncertainties'[3] of the common law. He also drew attention to the fact that section 4(2) - unlike section 11[4] - makes no reference to the court 'having power'[5] to order postponement; and accordingly indicated that there are no limitations derived from common law (as Lord Denning, M.R. believed) as to the circumstances in which an

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1. See p 1024 and p 1025 for the facts of these cases.
2. This, of course, is the name given to the procedure whereby the jury are excluded from court whilst the judge determines the admissibility of controversial evidence: often highly prejudicial to the accused. It is considered axiomatic that the media should not publish what the court - for fear of possible prejudice - has thus taken pains to keep from the jury.
3. R v Horsham J.J., supra, at 463.
4. See p 1057, where this provision is further described.
5. See s 11, Contempt of Court Act, 1981, further discussed ibid.

order for postponement of reporting may be made.

The third point of note is the disagreement reflected in the judgment as to whether the breach of an order for postponement automatically constitutes contempt. Shaw, L.J. and Ackner, L.J. both clearly believed that - if this were not the position - the new provision would be 'quite futile'[1]. They accordingly emphasised that the section had created a new head of contempt of court, so that 'any journalist who published in contravention of an order for postponement would be guilty of contempt under th[e] new rule'[2]. Lord Denning, however, was deeply disturbed at the notion that an order for postponement could be made by the court, at the joint request of the parties, with little consideration being given to the public interest in full reporting and without the media being afforded 'any notice of it or any opportunity to be heard on it'[3]. This, in his Lordship's view, would constitute 'nothing less than a power, by consent of the parties, to muzzle the press'[4]. This Lord Denning was not prepared to countenance; and he accordingly took pains to stress that the breach of an order for postponement would not ipso facto constitute contempt of court[5].

Valid as Lord Denning, M.R.'s misgivings seem[6], they clearly cannot prevail over the concurring views of the remaining members of the Court of Appeal. It seems thus that breach of an

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1. R v Horsham J.J., supra, at 456 (per Shaw, L.J.) and 462 (per Ackner, L.J.).
2. Ibid, at 463, per Ackner, L.J.
3. Ibid, at 448, per Lord Denning, M.R.
4. Ibid.
5. See ibid.
6. It should, however, also be remembered that the court has power to order postponement only where this is 'necessary'.

order for postponement is indeed automatically a contempt; and that the amending legislation of the United Kingdom has accordingly introduced a power to inhibit the reporting of proceedings which is wide-ranging in ambit and which, most disturbingly, exercises its prohibitive effect at the precise point in time when public interest in the issues underlying the proceedings is at its height. The legislation would accordingly be far preferable if it incorporated an express obligation on the courts to invite representations from the media before ordering postponement; and if the courts had also been enjoined to give specific consideration not only to whether postponement is necessary but also to whether this factor is not outweighed by public interest in full publicity.

The final point which should be noted is that the Court of Appeal was unanimous in finding that the new section applies to proceedings at committal stage as well as at trial[1]. This conclusion of the court is clearly correct on the wording of the section, but also underlines the wide ambit of the provision by making it clear that media reports may be restricted under its terms from the very outset of litigation[2].

The second of the reforms introduced by the Contempt of Court Act, 1981 (in the context of reporting proceedings) must now be

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1. R v Horsham J.J., supra, at 447 (per Lord Denning, M.R.), 456 (per Shaw, L.J.) and 457 (per Ackner, L.J.).

2. In practice, however, this is unlikely to have much impact in the United Kingdom where committal proceedings, in any event, generally take place without any oral examination of evidence at all; and subject to rigid limitations on the facts which may be reported. An order for postponement under s 4(2) of the Contempt of Court Act, 1981 could therefore only have relevance in relation to committal proceedings if one of the accused (as in the Horsham Justices case) had previously obtained an order lifting restrictions.

examined. This is provided by section 11 which states :

> 'In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld'.[1]

The meaning of this provision is, unfortunately, far from clear. The section is undoubtedly designed to implement the recommendation of the House of Lords in the Leveller case that some form of 'warning' or 'ruling' should be given by the courts as to the implications (for media reporting) of the adoption of devices such as the use of pseudonyms in the course of public proceedings[2]. The provision does little, however, to clarify the circumstances in which such a ruling may validly be given: except to indicate that the court must have 'power to do so'[3]. Whether the court enjoys such power in fact must presumably be determined in accordance with the common law. It follows that no legislative attempt has been made to elucidate the somewhat amorphous principles established in the Leveller and Socialist Worker decisions[4]. The United Kingdom Parliament has accordingly

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1. s 11, Contempt of Court Act, 1981.

2. See Attorney-General v Leveller Magazine Ltd, [1979] A.C. 440 (H.L.(E.)) at 465, for example, where Lord Edmund-Davies declared that it would be helpful to the media if the courts were 'to draw express attention to any procedural decisions ... implemented during the hearing, to explain that they were aimed at ensuring the due and fair administration of justice and to indicate that any [conduct] ... calculated to prejudice that aim [might constitute] ... contempt'.

3. See s 11, supra.

4. See p 1035, et seq.

done little to implement the recommendation of the Phillimore Committee that legislation should be introduced to provide for the 'specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial'[1].

Two further points remain to be noted. First, it would seem (following the approach of the majority of the Court of Appeal in R v Horsham J.J., ex parte Farquharson[2]) that breach of an order of prohibition issued by a court constitutes - ipso facto - a contempt of court. Secondly, the word 'necessary' in the provision should be given the same meaning as in section 4(2) above[3]: so that any restriction on reporting must satisfy the test of 'pressing social need'[4].

### 11.8.3. Reform of reporting of proceedings conducted in private

It will be recalled that there is considerable confusion at common law (as graphically demonstrated by the judgments of the House of Lords in Scott v Scott[5] and Attorney-General v Leveller Magazine Ltd[6]) as to the extent to which proceedings conducted in private may be reported by the media. Hence, in the United Kingdom, an attempt has accordingly been made, as previously explained, to bring greater certainty into the

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1. The Phillimore Report, Cmnd 5794, 1974, para 142, n 72.
2. [1982] 2 W.L.R. 430 (C.A.): and see also the discussion at p 1055 above.
3. This is in accordance with the general principle of statutory interpretation that words and phrases should be given the same meaning throughout an enactment.
4. See p 1051.
5. [1913] A.C. 417 (H.L.(E.)).
6. [1979] A.C. 440 (H.L.(E.)).

law through the enactment of section 12 of the Administration of Justice Act of 1960. This provision thus specifies various circumstances in which the reporting of proceedings held in camera will constitute contempt. It begins, however, by affirming the general principle that '[t]he publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court'[1]; and then specifies five sets of exceptional circumstances where this will indeed be the case. Thus, publication of information relating to court proceedings constitutes contempt[2] where (in outline) wardship[3] or mental health[4] are in issue, or where the court sits in private 'for reasons of national security'[5], or where the information relates to some secret process[6], or :

> 'where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published'.[7]

Any order of court (consequent upon proceedings in private) may, however, be published - except where the court 'having power to

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1. s 12(1), Administration of Justice Act, 1960.
2. The terms of s 12(1) seem clearly to indicate that publication of information of this nature will ipso facto constitute contempt. However, s 12(4) of the Act throws considerable doubt on this interpretation by providing that no publication may constitute contempt under the Act unless it would also have done so at common law: and, at common law, as indicated in Scott v Scott, restrictions on publicity remain operative only so long as needed to serve the object of the suit - whereas no time limitations at all are contained within the legislation. This conundrum is considered further below.
3. s 12(1)(a), supra, which applies also to adoption, guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant.
4. s 12(1)(b), ibid, which applies to proceedings under Part VIII Mental Health Act, 1959.
5. s 12(1)(c), ibid.
6. s 12(1)(d), ibid, which applies also to discoveries or

continued .....

do so' expressly prohibits publication[1].

Section 12(4) then provides:

> 'Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section'.[2]

This proviso has thrown the proper meaning and ambit of section 12 into considerable confusion: for it is subject to diametrically opposite interpretation. 'On one view it may be read as establishing that s. 12(1) - (3) contains, as it were, a complete and comprehensive code, and as saying that it is not permissible to imply that something further may constitute a contempt for which specific provision has not been made. The other possible interpretation, however, is that s 12(4) means, rather, that the section is not to be taken as having extended the number of occasions on which a contempt would be committed, but is to be read subject to the existing law'[3].

Such judicial authority as exists suggests that the latter is the correct interpretation. Thus, in In re F. (orse. A.) (A Minor) (Publication of Information)[4], Lord Scarman declared:

> 'I think it likely that the subsection was enacted to ensure that no one would in future be found guilty of

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inventions.

7. s 12(1)(e), ibid.

1. s 12(2), ibid.

2. s 12(4), ibid.

3. Miller, op cit, pp 215 - 216, emphasis supplied.

4. [1977] Fam. 58.

> contempt who would not also under the pre-existing law have been found guilty. Certainly such a construction is consistent with the law's basic concern to protect freedom of speech and individual liberty'.
> [1]

This interpretation was approved by Lord Edmund-Davies in Attorney-General v Leveller Magazine Ltd[2]; and an anologous interpretation was applied by Lord Denning, M.R. (in R v Horsham J.J., ex parte Farquaharson[3]) to the similarly worded section 6(b) of the Contempt of Court Act, 1981[4].

It seems then - despite the criticism of this interpretation voiced by those who fear the continued operation of the common law with all its uncertainties[5] - that the section does not provide a code complete in itself determing when proceedings conducted in private may lawfully be reported. Instead, the common law continues to operate in a number of important respects. It thus determines when publication may be prohibited in the residue of cases not covered by the four specified categories[6] and also governs the circumstances in which publication of an order of court may be curtailed[7]. Most important of all, however, the common law continues, in general, to determine whether the reporting of proceedings conducted in private constitutes a contempt (irrespective of whether the proceedings

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1. Ibid, at 86.
2. [1979] A.C. 440 (H.L.(E.)), at 465.
3. [1982] W.L.R. 430 (C.A.), at 449.
4. Ibid, where Lord Denning, M.R. accordingly concludes that an order for postponement (as previously discussed) may only be made where this could have been done at common law.
5. See, for example, Miller, op cit, p 216, who considers the alternate interpretation 'the more convenient'.
6. See s 12(1)(a) - (d) and s 12(1)(e), supra.
7. See s 12(2), ibid.

in issue fall within one of the exceptional categories established by section 12(1). Thus, for example, the reporting of proceedings conducted in private by virtue of national security interests[1] or because some secret process is in issue[2] - though clearly contrary to the legislation - does not automatically constitute a contempt. For this result to follow, 'something more'[3] must be established: and it must therefore be shown that publication is also a contempt at common law on the basis that it is prejudicial to the administration of justice, either in the particular case or in general.

The consequence of this interpretation is undoubtedly a greater uncertainty in the law (in that it remains necessary to weigh the likelihood of such prejudice resulting - rather than merely to apply a simple formula[4]); but the overall result is undoubtedly to make for flexibility, to uphold the principle of open justice and to accord due recognition to the importance of freedom of expression[5]. Hence, as long as the present United Kingdom statute retains its present wording, this interpretation is the one which clearly has the greater merit from the viewpoint of media freedom. However, it would also be possible to eliminate the major difficulties in the provision by altering its terms -

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1. See s 12(1)(c), ibid.
2. See s 12(1)(d), ibid.
3. See Attorney-General v Leveller Magazine Ltd, supra, at 440, per Lord Edmund-Davies.
4. On the alternative interpretation, all that would be necessary would be to show, for example, that the report in issue related to patent proceedings conducted in chambers - without considering factors such as the timing of the report and whether restriction was still necessary to preserve the effective administration of justice.
5. See again the dictum of Lord Scarman above, and note the absurdities which would otherwise result through (for example), the prohibition of a report on a secret process which had already entered the public domain.

and this alternative is examined further below[1].

## 11.9. The Need for Similar Reform in Nigerian Law

Having thus briefly outlined the legislative reforms introduced in the United Kingdom in an attempt to overcome the difficulties presented by the common law in this context, it now remains to consider whether equivalent provisions should be introduced into Nigeria.

### 11.9.1. Reporting committal proceedings

In deciding whether it is appropriate to introduce restrictions on the reporting of committal proceedings similar to those now contained in section 8 of the Magistrates' Courts Act of 1980, the first point which must be remembered is that trial by jury is very much the exception in Nigeria. Accordingly, there is considerably less need to guard against potential prejudice to fair trial, since it is well recognised that judicial officers (to whom the trial of proceedings is - in general - exclusively entrusted in Nigeria) are trained and equipped to focus their attention on the legally admissible evidence alone.

In the light of this important practical difference between the two jurisdictions, it seems clear that there is no need for blanket restriction on the reporting of committal proceedings in Nigeria. The only provision which might be considered appropriate, therefore, is the flexible formula suggested by Miller[2]: in terms of which a fair and accurate report of committal proceedings would only constitute contempt if it would clearly be prejudicial to the ultimate fair trial of an accused.

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1. See p 1068.
2. See Miller, op cit, p 114, previously discussed at p 1047.

11.9.2. Postponement and restriction of reporting of trial proceedings in open court

As regards the changes introduced by section 4(2) of the Contempt of Court Act, 1981 (authorising the postponement of reporting where 'necessary' to preclude 'serious' prejudice), it is clear that this provision (as framed) may constitute a considerable threat to freedom of expression, particularly in view of the fear expressed by Lord Denning, M.R. that it may enable the parties to proceedings - by mutual consent - to place a muzzle on the press, irrespective of the public interest in full disclosure and discussion of the case. If this interpretation is correct, then the provision is totally objectionable: especially in Nigeria where (leaving aside for the present all question of the constitutionality of any reporting restriction) jury trial is, in any event, the exception; and where there is accordingly far less danger of prejudice to fair trial. It is therefore submitted that - if an equivalent provision is to be introduced into Nigeria at all[1] - it should incorporate the following additional safeguards :

(i) 'necessary' should be defined with greater clarity to ensure that it is interpreted as connoting a 'pressing social need'[2];

(ii) the criterion for postponement should be 'a substantial risk of serious prejudice' (echoing the wording of section 2(2) of the Contempt of Court Act, 1981,

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1. It may be preferable for Nigeria to abandon the United Kingdom lead entirely; and to follow instead the example of the United States of America, further explained in due course.

2. See p 1051.

previously described in relation to the sub judice rule[1]) instead of the United Kingdom requirement which refers only to 'substantial risk';

(iii) the public interest in full publication should be expressed to be a factor which must always be taken into specific account: and which should not lightly be outweighed by the alleged need for postponement (especially where trial is to be by trained judicial officer alone).

As regards the power to restrict publication of certain evidence (now contained in section 11 of the United Kingdom Contempt of Court Act, 1981), the merits of this provision must be gauged in the light of the present Nigerian rule, contained in section 33(4)(b) of the Constitution, which empowers a court or tribunal to make arrangements to guard against disclosure of certain evidence whenever a Minister (of the Federal Government) or a Commissioner (of a State Government) 'satisfies it ... that it would not be in the public interest for any matter to be publicly disclosed'[2]. This contrasts sharply with section 11 which (it may be recalled) entitles a court, where it has power to do so at common law, to prohibit the publication of certain evidence where this is 'necessary' for the purpose for for which it was kept secret during the course of the proceedings.

It is submitted that section 11 - with its insistence that prohibition of publication must be necessary - is preferable to

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1. See p 801, above.

2. s 33(4)(b), Constitution of the Federal Republic of Nigeria, 1979, previously cited at p 1007, where the relevant provisions are reproduced in full.

to the present Nigerian provision. The requirement (in terms of section 33(4)(b)) that the court must be 'satisfied' that publication would be contrary to the 'public interest' is inherently vague: and no attempt is made to specify the criteria which should govern the court in the exercise of its discretion. However, section 11 is also gravely deficient in its failure to clarify the circumstances in which prohibition may be ordered; and in the way it fudges this issue by the bland statement that the court must have 'power'[1] to do so.

On the other hand, however, it must also be acknowledged that disclosure of specified evidence may legitimately need to be prohibited in certain circumstances; and, unless the courts are accorded the power to order such restriction in appropriate instances, the temptation will be to opt for trial in camera instead. Such a consequence would be far more serious than restricting the reporting of specified evidence: for, as emphasised by Lord Widgery, C.J. in the Socialist Worker[2] case,

> ' [w]hen one has an order for trial in camera, all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone. Where one has a hearing which is open, but where the names of the witnesses are withheld, virtually all the desirable features of having the public present are to be seen. The only thing which is kept from their knowledge is the name of the witness'.[3]

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1. See s 11, Contempt of Court Act, 1981.
2. R v Socialist Worker Printers and Publishers Ltd, ex p. Attorney-General, [1975] Q.B. 637 (D.C.)
3. Ibid, at 652.

There is sound sense in this; and it is accordingly submitted that Nigeria would be well advised (at minimum[1]) to adopt a provision similar to that contained in section 11 of the Contempt of Court Act, 1981. It should be stressed, however, that restriction can only be ordered where necessary (in the sense that there is a 'pressing social need' for prohibition[2]); and it should also be made clear that the court has power to order non-disclosure only in those circumstances in which, under the 1979 Constitution, it would be entitled to sit in camera[3]. As an additional safeguard, the court should also be enjoined to consider whether the public interest in disclosure outweighs the particular interest in the service of which suppression is allegedly required. In this way, the interests to be taken into account in ordering restriction would be kept firmly before the courts: and the media would enjoy the advantage of certainty, in that it would be clear that an express order of court was required to effect prohibition (and that contempt could not be committed save through the breach of such an order). This would present at least something of an advance over the present broad statutory rule and uncertain common law position.

### 11.9.3. Reporting proceedings in private

It remains (under this head) to consider whether Nigeria should follow the United Kingdom lead as regards the reporting of proceedings conducted in private: and introduce a provision equiva-

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1. Again, more radical reform may be more appropriate, as further discussed in due course.
2. See p 1051.
3. See s 33(4)(a), Constitution, supra, previously cited at p 1007.

lent to section 12 of the Administration of Justice Act, 1960[1]. It must be acknowledged that the provision has certain deficiencies, as emphasied above: particulary in the continuing uncertainty as to whether the common law, with all its complexities, must still be taken into account. This difficulty would need to be eliminated if an equivalent provision were to be introduced into Nigeria; and thus, at minimum, any such legislation adopted in Nigeria should make it clear that restriction on reporting is legitimate only in the four instances specified[2] - and then only where this is necessary[3] to protect the administration of justice. It should thus be made clear that the statutory provision proposed would indeed constitute a code complete in itself, covering in full the circumstances in which restriction on the reporting of proceedings in camera may be enjoined. It may be argued that this is too rigid a framework; and that there is a need for some residual discretion to be conferred upon the courts to cater for situations not falling within the four enumerated categories. There is undoubtedly certain merit in this contention; but it is submitted that it must be rejected because of the uncertainty it would generate and the temptation it would present to impose ever-widening restraints on publication: contrary not only to freedom of expression but also to the fundamental principle of open justice.

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1. See p 1059 et seq.
2. These four categories cover, in essence, wardship, mental health, national security and patent proceedings.
3. 'Necessary' should bear its usual connotation of 'pressing social need'. This would also eliminate the difficulty, under the present United Kingdom provision, that reports of secret processes which had already entered the public domain might be held to constitute contempt.

It is further submitted that a provision modelled on section 12 - but incorporating the modifications described above - would represent a considerable advance over the present Nigerian law. In the northern states, the reporting of proceedings *in camera* is still governed *in toto* by the common law, with all its uncertainties, including the doubt as to whether any report *at all* as to the facts or parties may lawfully be published [1]. The statutory reform suggested would have the merit of certainty, as well as that of making it clear that 'the publication of information relating to proceedings before any court sitting in private [is] not *of itself* ... contempt of court'[2].

In the southern states (where the reporting of proceedings is governed both by the common law - to which the same considerations *mutatis mutandis* apply - and by section 133(5) of the Criminal Code, with its blanket restriction on the reporting of *any* evidence so heard), the suggested reform would have the advantage of limiting the present prohibition: and of making it clear that restriction may only be imposed in specified and limited circumstances. Given the vital importance of open justice (to say nothing of freedom of expression), this would represent a very considerable improvement over the present position.

In summary, it is thus apparent that there is a certain degree of merit in the reforms which the United Kingdom has introduced; and that Nigerian law would be improved by adopting certain

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1. See p 1040.
2. See s 12(1), Administration of Justice Act, 1960, emphasis supplied.

analogous provisions, modified in the manner suggested above. However, it remains to examine the approach taken in the United States of America to media reports of court proceedings: for this is radically different, and may well represent a far preferable example to follow.

## 11.10. The Contrasting United States' Approach

The case of Estes v Texas[1] provides a convenient starting-point for examination of the contrasting United States' approach. Estes was a 'flamboyant Texas financier'[2], accused of large-scale swindling. At the two-day pre-trial hearing of the case, the court was packed with journalists (from both the print and electronic media) and technicians; and the room itself 'was turned into a snake-pit by the multiplicity of cameras, wires [and] microphones'[3]. The actual trial was conducted under considerably greater control, the judge having ruled that televising was permitted - except for 'live coverage of the interrogation of prospective jurors or the testimony of witnesses'[4] - but that the number of television cameras should be restricted to four[5] and that these should be installed in a specially constructed booth at the back of the courtoom (in which, however, they in fact remained 'visible to all'[6]). Restrictions were also placed on the number of still photographers permitted in the courtroom.

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1. 381 U.S. 532, 85 S. Ct. 1628 (1965).
2. Nelson and Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 267.
3. The New York Times, 9 June 1965, p 31c (cited by Abraham, Freedom and the Court, 4th ed., New York, 1982, p 164).
4. Nelson & Teeter, supra.
5. One from each of the major networks (CBS, NBC and ABC) and one from a local television station.
6. Nelson & Teeter, supra, p 268.

Estes was convicted; and he appealed to the Supreme Court on the ground that he had been deprived - through excessive media coverage - of the right to fair trial guaranteed by the Constitution. The Supreme Court - by a majority of 5:4 - agreed. It should, however, be noted at the outset that Justice Harlan (who supplied the fifth assent in the majority opinion) 'voted to overturn Estes' conviction because the case was one of "great notoriety" but ... reserved judgment on the televising of more routine cases'[1].

In delivering the opinion of the Court, Mr Justice Clark stressed that the 'public trial' guaranteed to an accused under the Sixth Amendment was intended to ensure fairness of treatment and to counter the oppression resulting from secret tribunals such as the Star Chamber. However, 'televising and photographing criminal trials did not aid the courts' solemn purpose of endeavoring to ascertain the truth'[2]. On the contrary, the televising of proceedings was likely to distract jurors[3], and to undermine the confidence of witnesses in giving evidence[4]; whilst the temptation it offered 'to play to the public audience'[5] was capable of affecting all participants in the proceedings - including counsel and the judge himself[6].

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1. Nelson & Teeter, supra, p 268.
2. Ibid, p 269.
3. See ibid. Jurors would be aware - not only of the 'tell-tale red lights' of the cameras - but also of the fact that the proceedings were being broadcast to a vast and unseen audience.
4. See ibid. Justice Clark pointed out that some witnesses might be 'demoralized and frightened, others ... cocky and given to overstatement' and that 'memories might falter, as with anyone speaking publicly'. See Estes v Texas, supra, at 547.
5. Ibid, at 549.
6. See ibid.

Chief Justice Warren concurred[1], emphasising that televising has 'an inevitable impact on all ... trial participants'[2], and detracts from the dignity of court proceedings, thus lessening their reliability. It is also fundamentally discriminatory, since only certain defendants are subjected to its intrusion[3].

Justice Harlan agreed, in the particular circumstances, that Estes' right to a fair trial had been infringed; but stressed (as previously noted) that the case was one of especial notoriety[4] and should not be seen as generating a more general rule. He also pointed out that further technological developments in the field of television might some day call for a re-appraisal of its effect on fair trial[5].

Justice Stewart, dissenting, emphasised that the presence of television and still photographers at the trial itself had been regulated at the judge's order; and was thus 'unable to find'[6] that this had detracted from the fairness of the proceedings. He also expressed grave concern at the majority opinions: which he considered 'disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas'[7].

Two of the other dissenting justices[8] - Justices White and

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1. He was joined by Justices Douglas and Goldberg in his concurring opinion.
2. Nelson & Teeter, supra, p 270.
3. See ibid.
4. See ibid, p 268.
5. See Estes v Texas, supra, at 595 - 596.
6. Ibid, at 601-602.
7. Ibid, at 614.
8. The four dissentients were Stewart, White, Black and Brennan.

Brennan - further declared that a flat ban against televising trials was premature[1]; whilst Justice Brennan also took pains to stress that 'the Estes decision was "not blanket constitutional prohibition against the televising of state criminal trials"'[2].

Another case of great significance is that of Sheppard v Maxwell[3]. Dr Sheppard, an osteopath in Bay Village, Ohio, had been charged with 'the bludgeon-murder of his pregnant wife'[4]. His trial was preceded by a barrage of adverse publicity[5]; and the proceedings themselves were characterised by a 'carnival atmosphere'[6] in which, inter alia, '[r]eporters moving in and out of the courtroom during times when the court was in session caused so much confusion that it was difficult for witnesses and lawyers to be heard despite a loudspeaker system'[7]. In addition, the press were positioned 'inside the lawyer's rail so close to the bench that it was in effect impossible for defense attorneys to consult with either their client or the judge without being overheard. When the jurors viewed the scene of the murder at Dr Sheppard's home, a [press representative] was included in the group, while other reporters hovered overhead in a press helicopter .... Jurors were photographed and interviewed by the news media as were witnesses'[8].

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1. See Estes v Texas, supra, at 615.
2. See ibid, at 617.
3. 384 U.S. 333, 86 S. Ct. 1507 (1966).
4. This emotive description is that of Abraham, op cit, p 164.
5. See Nelson & Teeter, op cit, pp 273 - 276, for a full account.
6. Sheppard v Maxwell, supra, at 358, per Mr Justice Clark.
7. Nelson & Teeter, supra, 276 - 277.
8. Abraham, supra, p 165.

Sheppard was convicted, but was ultimately[1] granted a re-trial (in which he was acquitted) at the instance of the Supreme Court. In delivering the majority opinion of the Court, Justice Clark emphasised the 'importance of the news media to the proper administration of justice'[2]; and - whilst disapproving of the conduct of the media in the case in many respects[3] - stressed that responsibility for ensuring fair trial lay primarily with the presiding judge. Thus, the judge 'should have adopted stricter rules governing the use of the courtroom by newsmen'[4] and should also have limited the number of reporters in the courtroom 'at the first sign that their presence would disrupt the trial'[5]. In addition, he 'should have insulated the jurors and witnesses from the news media, and "should have made some effort to control the release of leads, information and gossip to the press by police officers, witnesses, and the counsel for both sides"'[6].

In the face of growing public concern at the need to ensure fair trial, the American Bar Association in 1968 approved 'Standards Relating to Fair Trial and Free Press', recommended by an Advisory Committee headed by Massachusetts Supreme Court

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1. Sheppard was convicted in December 1954 and remained in jail until 1964 'when a federal district judge in Dayton ... released him [on the basis] ... that prejudicial publicity had denied him a fair trial. Two years later the Supreme Court affirmed that action by a vote of 8:1, giving Ohio authorities a choice of retrying him or of dismissing the case against him'. Abraham, ibid, p 164. (The lone dissentient was Justice Black who, unfortunately, did not express his reasons for disagreeing with the majority).
2. Nelson & Teeter, op cit, p 278.
3. See ibid. The authors state that 'deep disapproval' of the media was implicit in many of Justice Clark's other statements, but that he also made it clear that the media had not been the only culprits.
4. Sheppard v Maxwell, supra, at 358.
5. Ibid.
6. Nelson & Teeter, supra, p 279, citing the judgment, ibid, at 549.

Justice Paul C. Reardon, and subsequently known as the 'Reardon Report'[1]. This was greeted by vociferous protest from the media; and the 'resultant uproar ... was at least in part instrumental in the adoption of a new set of rules by The Judical Conference of the United States'[2]. These principles - known as the 'Kaufman Rules'[3] - are less restrictive than those contained in the Reardon Report and 'do not attempt to define any standards for the news media ... beyond the confines of the courtroom'[4]. In addition, in a number of states, 'a press-bar rapprochement occurred, leading to [the] construction, by joint committees of press and bar, of guidelines for the coverage of criminal trials'[5].

However, 'the basic dilemma of drawing lines between the right to a fair trial and that of freedom of the press remain[ed]'[6]; and surfaced again in 1976 in Nebraska Press Association v Stuart[7], in which the validity of a 'gag order' - restricting the publicising of trial proceedings - was challenged. This issue was of great practical import for, in the decade since 1966, the issue of such orders had become ever more prevalent and at least 174 restrictive orders had been issued by courts

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1. See Nelson & Teeter, ibid, p 283.
2. Abraham, op cit, p 166.
3. See ibid.
4. Ibid.
5. Nelson & Teeter, supra, p 284. For examples of such guidelines, see ibid, pp 284 - 288; and see also the 'Statement of policy' regarding the release of information by Justice Department officials at pp 288 - 291.
6. Abraham, supra.
7. 427 U.S. 539, 96 S. Ct. 2791 (1976)

against the news media[1].

Nebraska Press Association v Stuart[2] arose out of a 'nightmarish Nebraska case involv[ing] the murder of six members of one family'[3], in which necrophilia was also alleged. A suspect was arrested the following day and, shortly thereafter, at the joint request of the prosecution and defence, the Lincoln County Court 'granted a sweeping order prohibiting the release or publication of any "testimony given or evidence adduced ..."'[4] in relation to the crime. The Nebraska Press Association intervened and asked Judge Hugh Stuart to set aside the order. The judge did so, but substituted it by his own restrictive order, which prohibited reporting on five subjects[5]. The ambit of the limitation was further reduced by the Nebraska Supreme Court; but restrictions nevertheless remained in force[6] - and the Press Association accordingly appealed to the Supreme Court: which unanimously reversed the judgment of the lower court[7].

Chief Justice Burger emphasised that any 'prior restraint' against publication carries a 'heavy presumption' against its constitutional validity'[8]. This presumption could only be rebutted by showing that the 'gravity of the evil, discounted by its improbability' rendered the particular invasion of free

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1. See Jack C Landau, 'The Challenge of the Communications Media', (1976) 62 American Bar Association Journal, pp 55 - 59.
2. Supra.
3. Nelson & Teeter, op cit, p 296.
4. Ibid.
5. See ibid, p 297, for details of these.
6. See ibid, for details. The Nebraska Supreme Court also sent the case back to District Judge Hugh Stuart for reconsideration of whether pre-trial hearings (previously open, though subject to the reporting restrictions) should be closed to the press and public.

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speech 'necessary to avoid the danger'[1]. Whilst Judge Stuart had clearly had grounds for thinking that there would be massive pre-trial publicity which might endanger fair trial, this did not justify the restriction order, as no alternatives[2] to prior restraint had been attempted by the Nebraska court[3]. Chief Justice Burger concluded by 'reaffirm[ing] that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but [that] the barriers to prior restraint remain high and the presumption against its use continues intact'[4].

It is noteworthy, moreover, that a number of the concurring opinions in the case go so far as to suggest that the prohibition against prior restraint in this context is indeed absolute[5]. Thus, for example, Justice White expressed 'grave doubt ... [as to] whether orders ... such as were entered in th[e] case would ever be justifiable'[6].

In keeping with the spirit of the Stuart decision (which was hailed as a major victory by the media[7]), the American Bar

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7. See ibid, pp 297 and 299.
8. Nebraska Press Association v Stuart, supra, at 558.
1. Ibid, at 562.
2. See ibid, at 563-4. Thus, no attempt had been made to change the venue for the trial, or to postpone it to allow the public furore to subside. Moreover, it remained possible to guard against prejudice amongst the jury by screening out those who had formed fixed views on the accused's guilt and by ensuring the jury's proper 'sequestration' during the trial.
3. See ibid.
4. Ibid, at 570.
5. See Nelson & Teeter, op cit, p 299
6. Nebraska Press Association v Stuart, supra, at 570.
7. See Nelson & Teeter, supra, p 299 who further point out

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Association adopted a new set of guidelines prohibiting the exclusion of the press from court proceedings or the issue of restrictions on reporting, unless it could be shown that publicity would 'create a clear and present danger' to fair trial[1].

Then, however, came Gannett Co v DePasquale[2]. Here, two defendants charged with second-degree murder, robbery and grand larceny, sought and obtained an order excluding the press and public from a pre-trial hearing. The New York Supreme Court vacated the closure order, but it was reinstated by the state's Court of Appeals, and application was made to the Supreme Court for relief.

In a highly controversial and complex judgment, the Supreme Court - by a majority of 5:4 - upheld the suppression order. The controlling plurality opinion was written by Justice Stewart[3], who asserted that 'members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials'[4] and that the accused's entitlement to public trial does not guarantee access to the public and

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that not all shared this enthusiasm, fearing that the decision would result in widespread closure of the courts to the media: a fear which proved justified to some extent.

1. See Abraham, op cit, p 167.
2. 443 U.S. 368 (1979).
3. Others on the majority side were Burger, Powell, Rehnquist and Stevens.
4. Gannett Co v DePasquale, supra, at 391.

media[1]. There was some doubt, however, in this 'multi-divided' judgment as to whether this applied simply to pre-trial hearing or to all stages of proceedings[2]. The dissentients[3], by contrast, 'saw a clear-cut right of press access in the Sixth Amendment - except in "highly unusual circumstances ... not present here"'[4]; and were adamant that this applied equally to pre-trial and trial stages of a criminal case[5].

The decision was followed by a further spate of closure orders[6]; and it was not long before further recourse was had to the Supreme Court. Thus, in 1980, in Richmond Newspapers v Virginia[7], the Court was again faced with the question of the legality of an order excluding the public and press from court - this time in the context of trial proceedings. The decision of the Court - by majority of 7:1[8], with one absention[9] - marks a watershed

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1. See Abraham, op cit, p 168, who submits that the majority were agreed on this point, which must therefore be seen as the ratio.
2. See Abraham, ibid, for some indication of the uncertainty evinced in the judgment.
3. These were Brennan, White, Marshall and Blackmun.
4. See Abraham, supra, p 168, citing Gannett Co v DePasquale, supra, at 448.
5. Abraham, ibid.
6. Some 200 state and local judges attempted to bar the press from their courts in the interim between this case and the Richmond decision, described below. See Abraham, ibid.
7. 488 U.S. 555 (1980)
8. Justice Rehnquist dissented.
9. Justice Powell, a native of Virginia, abstained.

victory for freedom of communication[1]. The Court ruled that, in the absence of '"an overriding interest to the contrary", the trial of a criminal case must be open to the public'[2]. The controlling opinion, written by Chief Justice Burger, 'emphasised that the public and the press have a constitutional right[3] to witness criminal trials'[4]; and that justice must not only be done but must also be seen to be done: a result 'that can best be provided by allowing people to observe it'[5].

More recently still, the Supreme Court has handed down yet another decision with important ramifications for freedom of the media. Following the Estes[6] case, television coverage of trials was severely circumscribed; but - with the passage of time - an increasing number of states came to permit some form of coverage by the news media, through agreement between the judiciary, the bar and the press[7]. In 1981, in Chandler v Florida[8], this was sanctioned by the Supreme Court which, in an 8:0 ruling[9], held that - notwithstanding objections by a defendant - 'states may permit the news media to televise, i.e., to photograph and broadcast, criminal trials; [and] that con-

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1. See Abraham, op cit, p 168.
2. Ibid.
3. This was 'implicit in the guarantees of the First Amendment for freedom of speech, of the press and of assembly' and in the Ninth Amendment's grant to 'the people' of 'certain rights' not specifically enumerated elsewhere. See ibid, citing Richmond Newspapers v Virginina, supra.
4. Abraham, ibid.
5. Richmond Newspapers v Virginia, supra, at 572.
6. Estes v Texas, 381 U.S. 532, discussed above.
7. See the 1977 Freedom of Information Report of the Associated Press Managing Editors Association, entitled "Cameras in the Courtroom: How To Get 'Em There", cited by Nelson & Teeter, op cit, p 272.
8. 449 U.S. 560 (1981)
9. Justice Stevens did not participate.

trolled televising (in Florida one camera and one cameraman) [does] not necessarily jeopardize the constitutional guarantee to a fair trial'[1].

In summary, thus, the approach of the United States could not be more different from that of the United Kingdom, nor of Nigeria. The distinction in attitude is clearly evident from the above discussion, but is perhaps epitomised by two further features of their contrasting approaches. In the United Kingdom, it is regarded as axiomatic that the media should not report matters deliberately kept from the purview of jurors - through the holding of a 'trial within a trial', as earlier explained[2]. In the United States, however, it has been held[3] that an order of court restricting the reporting of such material is unconstitutional[4]. The difference in approach is also especially apparent in the contrast between the recent Supreme Court decision confirming the legality of controlled televising of trial proceedings[5], and the recent enactment in the United Kingdom of an express prohibition on the use of tape-recorders -

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1. Abraham, op cit, p 164, n 57. Abraham further points out that Chandler dealt only with a state trial, but submits that 'the extension of its gravamen to the federal sphere [is] a distinct possibility'.

2. See 1054 above. Today, this would presumably require an express order under s 4(2), Contempt of Court Act, 1981.

3. This was by the Washington Supreme Court in State ex rel. Superior Court of Snohomish County v Sperry, 79 Wash. 2d. 69 483 P. 2d 608, cert. denied 404 U.S. 939 (1971).

4. The judge in this instance had ordered reporters to confine reports to those events which took place in front of the jury. Sperry and a colleague ignored the order and published evidence heard whilst the jury was outside the courtroom. The Washington Supreme Court upheld them in so doing, and declared that the prohibition violated 'the reporters' constitutional right to report to the public what happened in open trial'. See Nelson & Teeter, op cit, p 292.

5. See Chandler v Florida, supra.

- let alone television cameras - in court[1].

The approach of the United States is not without its dangers - as demonstrated by the Estes[2] and Sheppard[3] cases. These plainly show the need for freedom of the media to be coupled with responsibility. It does not follow, however, that responsibility must be ensured through blanket restrictions on the publicising of proceedings of the kind imposed by the common law. The Estes and Sheppard cases are both extreme examples of 'licence' - i.e., of freedom without responsibility - and though they are not the only instances in which this may have occurred[4], there seems no reason (in principle) why adequate standards of responsibility may not be set and maintained through cooperation between media and legal associations[5] and the adoption of suitable guidelines[6]. Subject to this safeguard, it is submitted that the United States' approach - in its firm adherence to open trial and freedom of the media - has considerable merit; and

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1. See s 9, Contempt of Court Act, 1981. This makes it clear that taperecorders (other than for the purpose of compiling official transcripts) may not be brought into court save by leave of the presiding judge: who has absolute discretion as to whether such leave should be granted at all; and (if so) as to the conditions to which it should be made subject.

2. Estes v Texas, 381 U.S. 532, 85 S. Ct. 1628 (1965).

3. Sheppard v Maxwell, 384 U.S. 333, 86 S. Ct. 1507 (1966).

4. See Nelson & Teeter, op cit, pp 256 - 258 (describing the publicity surrounding the Kennedy assassinations) and p 265 (describing the 'Lindbergh case' concerning the trial for kidnap and murder - of a 19-month old baby - of Bruno Richard Hauptmann).

5. Such as the American Bar Association.

6. See p 1075 above, where reference is made to the increasing incidence in the United States of such agreements; and see again the examples of guidelines prepared in the past, as cited by Nelson & Teeter, supra, pp 284 - 291.

that it should be borne strongly in mind in considering the last remaining question: the constitutionality of the present Nigerian law; and the reforms of which it stands in need.

## 11.11 The Constitutionality of Present Restraints on Reporting of Proceedings

The constitutionality of restrictions on reporting by the media of court proceedings (conducted either in public or private) is not altogether easy to assess. It will, of course, be recalled that the right to 'receive and impart ideas and information without interference'[1] is guaranteed by section 36 of the Constitution and that any restriction which cuts across this right is *prima facie* unconstitutional. It will also be recalled, however, that the right guaranteed by section 36 is not absolute; and that it is subject to derogation through laws that are 'reasonably justifiable in a democratic society' in order to promote certain recognised interests. The difficulty, as regards this branch of the law of contempt, is to find a constitutionally recognised interest which the various restrictions on reporting may be said to serve. It is of course true that section 36(3)(a) authorises derogation from freedom of expression for the purpose of 'maintaining the authority and independence of courts'[2]; but it may also be argued that restrictions on the reporting of proceedings are not aimed at promoting either the 'authority' of the courts or their 'independence':

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1. s 36(1), Constitution of the Federal Republic of Nigeria, 1979.
2. s 36(3)(a), *ibid*.

but, rather, are designed to preserve the proper administration of justice - an interest which is not, of course, recognised by the Constitution in so many words. Thus, taking the Poulson[1] case, for example, it might be contended that the 'order'[2] for postponement of reporting was not designed to uphold either the authority of the court or its independence: but rather to prevent prejudice to the fair trial of an accused in related proceedings.

This difficulty may, however, be counted by two considerations. First, (as in the context of the sub judice rule) a restriction on reporting of this nature is designed to uphold the authority of the judge (in the related proceedings): and to ensure that his decision-making role is neither usurped by others nor rendered subject to external influence. Secondly, due regard must also be paid to the derogations authorised by section 41 of the Constitution. Thus, in a situation like the Poulson case, it is strongly arguable that restriction was intended to promote 'the rights ... of others', within the meaning of section 41(1)(b)[3].

It seems thus that restrictions on the reporting by the media of court proceedings do indeed fall within the ambit of the interests recognised by the Constitution as authorising derogation from free expression; and the crucial question which

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1. The Times, 4 January, 1974, described at p. 1025.
2. Some doubt surrounds the question whether the trial judge in the case went so far as to order a restriction on reporting. See p 1025, where the judge's direction is reproduced.
3. See s 41(1)(b), Constitution of the Federal Republic of Nigeria, 1979.

then arises for consideration is whether the restrictions are 'reasonably justifiable in a democratic society' for the purpose of promoting those interests.

This question is not altogether easy to answer: and the difficulty is compounded by the variety of rules in issue. It is submitted that certain restrictions quite clearly cannot be accepted as 'reasonably justifiable'. These include the blanket prohibition on the reporting of evidence heard in private imposed by section 133(5) of the Criminal Code as well as the alleged common law rule - described above[1] - that no mention may be made of even the facts or parties involved in proceedings which are heard in camera. On the other hand, however, certain aspects of Nigerian law - for example, the prohibition against 'misreporting' in section 133(4) of the Criminal Code or the common law rule that reports must be fair, accurate and bona fide - are clearly 'reasonably justifiable': and are, indeed, vitally important safeguards.

The range of rules thus applicable within the context of reporting court proceedings makes it difficult to assess their constitutionality in general terms. At the risk of over-simplification, it is apparent that the principal objectionable feature of restrictions on reporting lies in the uncertainty and ambivalence of the common law: and the tendency which this inevitably generates to err on the side of over-caution and exercise self-censorship to an extent which may not, in reality, be required by the law.

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1. See p 1040.

It is accordingly submitted that, in order to bring Nigerian law into line with the constitutional guarantee of freedom of expression, those reforms (modelled on United Kingdom legislation) as have been outlined above should - at minimum - be introduced.

However, account must also be taken of the radically different approach of the United States of America to the problem of reporting court proceedings. It is submitted that there is considerable merit in this approach, for it views any prior restraint against publication with considerable suspicion and tolerates restriction only where necessary to avert a clear and present danger. The optimum solution may therefore be to adopt a combination of the United Kingdom and United States' approaches: in which the circumstances in which reporting may be restricted at all would be clearly stated and due emphasis would be placed on the requirements that restriction be 'necessary' and that the public interest in disclosure be taken into express account. The latter requirement may, however, be bolstered to positive effect by emphasising the 'clear and present danger' test effectively applied in the United States and by enjoining the courts to consider whether any other means of averting the threatened risk can be found. Moreover, (in the context of prejudicial publicity) it must always be remembered that jury trial is the exception in Nigeria: and that there is commensurately less danger of adverse publicity affecting the outcome of proceedings. In addition, it must be remembered that there is not only intrinsic merit in the aphorism that justice must not only be done but must also 'be seen to be done'; but that the tele-

vising of court proceedings may also serve a vitally important function of educating the public as to the role of the courts in dispute resolution and in encouraging their utilisation for this purpose. Accordingly, the potential benefits of controlled television coverage should be acknowledged: and any blanket prohibition of such coverage should be eschewed. At the same time, precautions against possible abuse by the media of the freedom thus accorded should be taken - through the adoption of 'guidelines' governing the conduct of the media and their relations with bench and bar, in a manner similar to that increasingly applied in the United States.

Such reform may seem radical indeed: but it must always be remembered that restrictions on the reporting of proceedings infringe both free expression and open justice - one of the most vital of all safeguards of individual liberty - and that they should therefore not lightly be imposed.

One final point requires some examination. It is, of course, inappropriate to question the 'constitutionality' of the provisions governing the circumstances in which trial in camera may be ordered or the disclosure of specified evidence may be prohibited. These provisions are contained - it will be recalled[1] - in section 33(4) of the 1979 Constitution and clearly cannot be challenged for constitutional invalidity. It may, however, be queried whether the sweeping terms of section 33(4) are such as to serve the best interests of

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1. See p 1007.

society; and it is accordingly submitted that the subsection should be amended to make it clear that a trial in camera must be justified not only by interests such as public order, morality, safety and so forth, but must also be 'necessary'[1] in order to avert a clear and present danger. It must always be remembered that 'publicity is the very soul of justice' and that '[o]nly in proportion as publicity has place can any of the checks applicable to judicial injustice operate'[2]. As regards the prohibition of disclosure of specified evidence, the provision should again be amended to make it clear that the court must not only be 'satisf[ied] ... that it would not be in the public interest for any matter to be publicly disclosed'[3], but also that it must be shown that restriction is needed to guard against a clear and present danger. Restriction of this kind is clearly far less dangerous than secret trial; but it, too, should not lightly be accepted lest it lead to a gradual erosion of the open administration of justice.

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1. This should be given its "usual" meaning, in terms of which it connotes a pressing social need.

2. Scott v Scott, [1913] A.C. 417 (H.L.(E.)), at 477, citing the graphic warning of Bentham.

3. See s 33(4)(b), Constitution of the Federal Republic of Nigeria, 1979.

# CHAPTER TWELVE

## JOURNALISTS' REFUSAL TO DISCLOSE THEIR SOURCES

### 12.1. The Significance of this Branch of Law for Media Freedom

Under this branch of law, the refusal of a witness to answer relevant and necessary questions (without lawful excuse for so doing[1]) is punishable as a contempt of court. The rule is based upon the principle that the proper administration of justice requires that all relevant evidence be placed before the court; and the common law is accordingly exceedingly chary of recognising any exception to the obligation placed on witnesses to answer all necessary questions. Detailed examination of the grounds upon which a witness may lawfully refuse to answer a relevant question lies outside the scope of this study[2]. In general[3], however, refusal is justified only if the answer may tend to incriminate the witness[4], or if the evidence is privileged[5]. Limited categories of privileged communication

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1. See text and notes below.

2. For further, though somewhat brief treatment, see C.J. Miller, Contempt of Court, London, 1976, pp 56 - 62; G.J. Borrie and N.V. Lowe, The Law of Contempt, London, 1973, pp 28 - 31; and A. Arlidge and D. Eady, The Law of Contempt, London, 1982, pp 199 - 203.

3. These grounds are not, of course, the only ones on which a witness may lawfully refuse to answer a question (see Re Working Men's Mutual Society, (1882), 21 Ch. D. 831); but they are, in practice, the ones most frequently invoked.

4. See John Huxley Buzzard, Richard May and M.N. Howard (eds.), Phipson on Evidence, 13th ed., London, 1982, para 15-16 et seq.

5. See ibid, Chapter 15; and see also Sir Rupert Cross, Evidence, London, 1979, Chapter XI.

have been acknowledged on the basis of overriding public interest; and it is accordingly accepted, for example, that privilege attaches to communications between lawyer and client[1]. Privilege has always been denied, however, in other professional relationships involving the communication of confidential information (such as those between doctor and patient, confessor and penitent[2]). Privilege has likewise been refused to confidential communications between the journalist and his source of information; and the result is that any journalist who is called upon to testify regarding an investigation he has conducted in the course of his professional duties is guilty of contempt of court if he refuses to answer. Journalists may therefore be compelled to disclose the identity of their sources: and this poses an incalculable threat to freedom of expression. The fear of future identification is likely to deter many a potential 'source' from approaching the media with his information; and the result of compelling disclosure, accordingly, is that 'the press's sources of information [may] dry up and the public [may] be deprived of being informed of many matters of great public importance'[3].

The practical significance and truth of this dictum could not be more graphically demonstrated than by reference to the Watergate affair in the United States, which led ultimately to the resignation of President Nixon. If reporters on the Washington Post and New York Times had been compelled to disclose the

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1. See Attorney-General v Mulholland; Attorney-General v Foster, [1963] 2 Q.B. 477, further discussed at p 1111 et seq.

2. See ibid.

3. British Steel Corporation v Granada Television Ltd, [1980] 3 W.L.R. 774 at 836, per Lord Scarman.

identity of their source[1], code-named "Deep Throat", it is doubtful whether much of the information disclosed through their investigations would ever have come to public light. In the graphic words of Lord Denning, M.R., approved by Lord Scarman in the House of Lords, the journalist's obligation to disclose his sources to avoid conviction for contempt carries with it the threat that '[w]rongdoing would not be disclosed ... and that [m]isdeeds in the corridors of power ... would never be made known'[2].

From the viewpoint of society, therefore, the immunity of journalists from the duty to disclose their souces is of the utmost importance and is an essential pre-condition for investigative journalism and the free flow of information. From the viewpoint of the individual journalist, moreover, the immunity is also of fundamental importance: for it is a canon of journalistic professional ethics that sources should never be disclosed. The obligation to do so imposed by the law of contempt accordingly places the journalist in an invidious position; and many reporters have suffered imprisonment for contempt rather than betray their professional integrity[3]. The rule which thus impales the individual journalist on the

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1. The proceedings in which immunity from disclosure was accorded these journalists - in the exceptional circumstances in issue - is further discussed below.

2. British Steel v Granada Television, supra, at 804, per Lord Salmon, approving this dictum of Lord Denning, M.R. in the earlier proceedings in the Court of Appeal.

3. See, for example, Attorney-General v Mulholland, supra, and New York Times Co v New Jersey, 439 U.S. 997 (1978), discussed further at p 1153.

sharp horns of an insoluble dilemma as to where his duty lies thus clearly has an immediate and deep personal significance for all those involved in reporting for the media.

In the United Kingdom - the source of origin of the common law of contempt in this context - the practical significance of the rule has recently been highlighted by a controversial decision of the House of Lords[1]; and by the enactment of the Contempt of Court Act, 1981 - which ameliorates the rigour of the common law in this regard to an appreciable extent. In Nigeria itself, the common law continues in principle to apply; although certain recent decisions of the Lagos State High Court evidence a welcome refusal to abide by the common law rule in the light of the constitutional guarantee of freedom of expression. These decisions by no means eliminate all difficulties, however, and it is accordingly imperative to examine the common law in some detail in order to assess the extent of the threat which it poses to freedom of the media.

## 12.2. Nigerian Sources of Law in this Regard

The Nigerian law as regards this aspect of contempt is to be found firstly in the body of English common law which applies throughout the country by virtue of the general reception process previously described[2]. In addition[3], the Criminal and Penal Codes both contain provisions relevant to this topic.

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1. This, of course, is in British Steel v Granada Television, supra, further discussed in due course.
2. See the section on the Sources of Nigerian Law, in Chapter Two above.
3. The relationship between the common law and the provisions of the Codes has earlier been described in Chapter Eight.

Thus, section 133(2) of the Criminal Code provides that '[a]ny person who ... having been sworn or affirmed [as a witness in proceedings] refuses without lawful excuse to answer a question ... is guilty of a simple offence and liable to imprisonment for three months'[1]. Furthermore, section 142 of the Penal Code renders it an offence, punishable by imprisonment for up to six months or by fine of up to £20 or both, for any person 'being legally bound to answer questions put to him on any subject by any public servant in the exercise of the lawful powers of such public servant'[2] to refuse to answer such a question.

In general, however, and in the light of the fact that it is the unwritten contempt jurisdiction which is most frequently invoked in practice, it is clearly the common law (with its unlimited penalties) which is the most important source of Nigerian law in this context.

Unfortunately, however, Nigerian precedents on the ambit of the common law rule obliging journalists to disclose their sources are minimal. Certain recent decisions (of the High Court of Lagos State) ruling against the constitutionality of the obligation are of great importance and are further analysed in some depth in due course. To understand the nature and extent of the common law obligation, it is first necessary, however, to have regard to English authorities. The common law in this context has recently been clarified by an important decision of the House of Lords - British

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1. s 133(2), Criminal Code, Cap 42 (Laws of the Federation of Nigeria and Lagos, 1958).

2. s 142, Penal Code, Cap 89, (Laws of Northern Nigeria, 1963).

Steel Corporation v Granada Television Ltd[1] - and no proper insight into the common law can be obtained without reference to this judgment. Accordingly, no apology is made for the fact that a considerable portion of the discussion which follows is centred around English authorities in general (and the vital Granada decision in particular). This is imperative not only in order to understand the common law but also because it provides a background which is essential to full appreciation of the Nigerian cases concerning the constitutionality of the law[2]. In addition, it should always be remembered that there is considerable cogency in the view that the Nigerian courts are still bound by decisions of the House of Lords interpreting the common law[3]; and this, of course, gives an added measure of significance to the Granada decision.

The first point which should be noting in examining the common law is that - although the law's refusal to extend testimonial privilege to journalists has recently been emphasised in the Granada case - there is nevertheless a considerable volume of common law authority which may be interpreted as affording some measure of support for such journalistic immunity. These authorities are accordingly worth canvassing in outline in order to place the rejection of the privilege in appropriate perspective.

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1. [1980] 3 W.L.R. 774 (H.L.(E.)).

2. Thus, in what is perhaps the most important of the Nigerian cases in this context, Adikwu and others v Federal House of Representatives of the National Assembly and others, [1982] 3 N.C.L.R. 394, the court refers in large measure to the Granada decision: and it would not be possible to appreciate the significance of the Nigerian court's view of the case, nor of the value of the Nigerian decision as a precedent, without having (in the first instance) a sound grasp of Granada.

3. See the section on the Sources of Nigerian Law, at p 161 et seq.

## 12.3. Support for Testimonial Privilege for Journalists at Common Law

The common law reflects certain limited support for the principle that journalists should not be compelled to disclose their sources of information. This support is to be found primarily in the judgments of Lord Denning, M.R. (in the Court of Appeal) and Lord Salmon (in the House of Lords) in British Steel Corporation v Granada Television Ltd[1]; and - to a lesser extent - in the so-called 'newspaper rule' and in the paucity of cases in which journalists have, in fact, been compelled to disclose their sources in the past. Each category of support now merits some examination.

### 12.3.1. The judgment of Lord Denning, M.R. in Granada

It needs no further emphasis that the Granada decision is of great importance in this study: and it is accordingly appropriate to set out the facts of the decision at the outset. In brief, an employee of the Corporation ('B.S.C.'), who was apparently motivated by a keen sense of indignation and injustice[2], "leaked" some 250 confidential documents to Granada Television ('Granada'), so as to let the public know that the steel strike then current could not be blamed entirely on trades union' intransigence but had at least in part been caused by mismanagement coupled with government intervention (notwithstanding public disclaimers - by both management and

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1. [1980] 3 W.L.R. 774 (H.L.(E.)).
2. Ibid, at 798, per Lord Denning, M.R.

government - to the contrary). Granada promised this 'source' that it would not reveal his identity.

The television company decided to utilize some 27 of these confidential documents ('the Steel Papers') in a programme (to be broadcast on 4 February 1980, as part of its World in Action series) on the national steel strike and its causes. It informed B.S.C. of its intention to do so on the day before the broadcast and invited B.S.C. (through its Chairman) to take part in the programme. The invitation was accepted, and the Chairman answered a number of questions based upon the Papers in the course of the broadcast. B.S.C. made no attempt to obtain an injunction precluding its transmission[1].

The following day, however, B.S.C. sought undertakings against further use of the documents and for their return from Granada. The Steel Papers were subsequently[2] returned to B.S.C. - but in a 'mutilated' state: all markings which could have identified the person from whom Granada had obtained them having been removed. B.S.C. thereupon applied for an order compelling Granada to disclose the names of those who had supplied them with the Steel Papers.

In the court a quo, Sir Robert Megarry, V.C. ruled in favour of granting the order sought. On appeal against this ruling,

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1. Granada subsequently conceded that if such an injunction had been sought, the broadcast would have been stopped. This concession was most unfortunate: for it not only elicited general disapproval by the courts of its conduct but also obscured consideration of the important question of the public interest in the disclosure of B.S.C.'s 'parlous' condition (further described below).

2. This was after Oliver, J. (on 6 February) had granted an ex parte injunction against further publication.

the Court of Appeal upheld the lower court's decision; and Lord Denning, M.R. concurred in this conclusion. His judgment is nevertheless notable, however, for the degree of support it evinces for the general principle that journalists should not be compelled to disclose their sources.

Lord Denning thus emphasised that 'the court has never ... compelled a newspaper to disclose the name of its informant ... [except] in ... Attorney-General v Mulholland and Foster[1] ... where on balance the public interest in compelling disclosure outweighed the public interest in protecting the sources of information'[2]. He further declared that English (and some United States' authorities[3]) indicated that the courts were 'reaching towards the principle [that] [t]he public has a right of access to information which is of public concern ... [and that] [i]n support of this right ..., the newspapers should not in general be compelled to disclose their sources of information'[4]. On the other hand, however, he also took pains to stress that this principle is not absolute; and that the journalist has no privilege in law which entitles him to refuse disclosure. The courts accordingly have power to order disclosure in appropriate circumstances: and the criterion for determining whether such order should indeed be made lies (in Lord Denning's

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1. [1963] 2 Q.B. 477, further discussed in due course. The vital public interests allegedly in issue were those of national security.

2. British Steel v Granada Television, supra, at 803.

3. The important United States' authorities on this question are further canvassed in due course. Those cited by Lord Denning, M.R. were Garland v Torre, Baker v F & F Investment, Democratic National Committee v McCord, and Branzburg v Hayes (all of which are fully cited below).

4. British Steel v Granada Television, supra, at 805.

view) in the degree of responsibility displayed by the media: so that, 'if a newspaper[1] should act irresponsibly, ... it forfeits its claim to protect its sources of information'[2]. On the facts of the case (as further explained in due course), Lord Denning, M.R. believed that Granada had failed to exercise the requisite responsibility[3]; and that it had accordingly forfeited its claim to the immunity it would otherwise have enjoyed.

12.3.2. The judgment of Lord Salmon in the Granada case

Whilst Lord Denning, M.R. thus evidences clear support for a general principle of source immunity (subject, however, to the obligation to act responsibly), the judgment of Lord Salmon in the Granada case, by contrast, contains no such caveat: and is a trenchant affirmation of the importance of source immunity and its vital role in ensuring a free flow of information to society.

Lord Salmon's judgment thus opens with the ringing declaration that 'a free press is one of the pillars of freedom in ... any ... democratic society'[4]. It then continues:

> 'A free press reports matters of general public importance, and cannot, in law, be under any obligation, save in exceptional circum-

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1. Lord Denning, M.R. subsequently (at 805, ibid) made it clear that his observations applied equally to television (and thus, presumably, would extend also to radio).
2. Ibid.
3. The need for responsibility is considered further at p 1128 et seq.
4. British Steel v Granada Television, supra, at 836.

> stances, to disclose the identity of the persons who supply it with the information appearing in its reports.
>
> It has been accepted for over 100 years that if this immunity did not exist, the press's sources of information would dry up and the public would be deprived of being informed of many matters of great public importance: this should not be allowed to happen in any free country'.
> [1]

Turning to the relevant authorities, Lord Salmon acknowledged that the 'newspaper rule'[2] had always been applied, in the past, in the context of libel proceedings, but submitted that this was purely fortuitous and that there was no reason, in principle, why the rule should be so limited[3]. He cited with approval that portion of the judgment of Lord Denning, M.R. in the earlier Court of Appeal proceedings which emphasises that 'newspapers should not in general be compelled to disclose their sources of information'[4], because - if this were not so - '[t]heir sources would dry up, [w]rongdoing would not be disclosed ... and [m]isdeeds[5] in the corridors of power ... would never be made known'[6]. He also stressed, as further explained in due course, that the only cases in which the media had been compelled to disclose their sources in the past were those in which vital

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1. Ibid, at 836.
2. The significance of the 'newspaper rule' is further discussed in the following sub-section of this study.
3. See British Steel v Granada Television, supra, at 839 - 840; and see also p 1105, below.
4. Ibid, at 804 (per Lord Denning, M.R.) and at 840 (per Lord Salmon).
5. Ibid, at 840. Lord Salmon further stated that he would add to 'misdeeds', 'serious faults and mistakes'.
6. Ibid.

interests of national security were at stake[1]; and declared in categoric terms :

> 'The immunity of the press to reveal its sources of information save in exceptional circumstances[2] is in the public interest, and has been so accepted by the courts for so long that ... it is wrong now to sweep this immunity away'.
> [3]

In his view, there were 'no circumstances in th[e] case which have ever before deprived or should ever deprive the press of [this] immunity; and he concluded by warning :

> 'The freedom of the press depends upon this immunity. Were it to disappear so would the sources from which its information is obtained; and the public would be deprived of much of the information to which the public of a free nation is entitled'.
> [4]

This judgment of Lord Salmon represents the high water mark of support for the principle that journalists - at common law - cannot in general be compelled to disclose their sources of information. It is, however, a dissenting view - no matter how emphatically declared - and cannot prevail over the clear conclusion of the majority to the opposite effect[5]. It should,

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1. These were Attorney-General v Clough, [1963] 1 Q.B. 773 and Attorney-General v Mulholland/Foster, [1963] 2 Q.B. 447, further discussed below.

2. In Lord Salmon's view, only national security has been recognised to date as giving rise to such 'exceptional circumstances'; though his Lordship was prepared to acknowledge that 'national security would not necessarily always be the only special circumstances (sic)'. See British Steel v Granada Television, supra, at 846.

3. Ibid.

4. Ibid.

5. See p 1114 et seq.

however, also be noted that although this judgment (and that of Lord Denning) comprise the clearest express judicial support for source immunity, implicit support for the principle may also be gleaned from two other features of common law: the 'newspaper rule' and the paucity of past precedent compelling disclosure.

12.3.3. The significance of the 'newspaper rule'

A measure of implicit support for the existence of a testimonial privilege for journalists at common law is to be found in the so-called 'newspaper rule'. This principle (which evolved through a number of different decisions[1]) provides that 'in libel actions against newspapers, interrogatories directed at discovering the source of information are not permitted'[2]. This was acknowledged as 'an exception to the rule requiring a defendant to disclose the source of his information [in defamation proceedings] where he pleads either privilege or fair comment'[3].

The reasons for the exception are not entirely clear[4]; and different grounds have been emphasised on various occasions[5]. In

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1. See Parnell v Walter (1890) 24 Q.B.D. 441; Elliott v Garrett [1902] 1 K.B. 870; Plymouth Mutual Co-operative and Industrial Society Ltd v Traders' Publishing Association Ltd [1906] 1 K.B. 403; Adams v Fisher (1914) 30 T.L.R. 288; Lyle-Samuel v Odhams Ltd [1920] 1 K.B. 135; and South Suburban Co-operative Society Ltd v Orum [1937] 2 K.B. 690.

2. See British Steel v Granada Television, supra, at 830, per Viscount Dilhorne.

3. See Lyle-Samuel v Odhams Ltd, supra, per Bankes, L.J.

4. See, for example, Lyle-Samuel, ibid, at 144 (per Scrutton, L.J.) and South Suburban Co-operative Society Ltd v Orum, supra, at 703 (per Scott, L.J.).

5. Thus, 'it has sometimes been held that the name of the informant was irrelevant: see Parnell v Walter [supra] ... and Adams v Fisher [supra]'. (See British Steel v Granada continued .....

essence, however, the rule is founded on policy considerations, described - in the Australian case of McGuiness v Attorney-General of Victoria[1] - as follows :

> 'The foundation of the rule is the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matters contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity'.[2]

In 1949, however, the principle ceased to apply to newspapers alone, as the Rules of the Supreme Court (implementing a recommendation of the Porter Committee on Defamation[3]) were changed to introduce a general prohibition on 'interrogatories as to a defendant's sources of information or grounds of belief in all actions for libel and slander where fair comment or publication on a privileged occasion [are] pleaded'[4]. The reason for this change was that the Committee believed that 'such interrogatories added considerably to the cost of litigation, imposed considerable hardship on a defendant and were seldom of any practical value[5]. The rule thus ceased to give special protection to newspapers alone: and this has greatly

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Television, supra, at 848, per Lord Fraser of Tullybelton). In Adam v Fisher, supra, Buckley, L.J. further explained that there were two possible reasons for the rule: first, that the object of such interrogatories might be to obtain the name of the informant in order to sue him, and that was improper; and, secondly, that disclosure of the informant's identity was not in the public interest.

1. (1940) 63 C.L.R. 73
2. Ibid, at 104, per Dixon, J.
3. Cmd. 7536, 1948, at para. 182.
4. See British Steel v Granada Television, supra, at 831, per Viscount Dilhorne.
5. See ibid.

exacerbated the controversy surrounding its significance in the context of more general source immunity.

It has been contended on a number of occasions[1] that the evolution of the newspaper rule - though initially confined to specific defences in defamation proceedings - reflected a 'development which, in reason and logic, should not stop at discovery, but should supply a general justification for withholding the names of contributors and the sources of information at all stages of any legal proceeding'[2]. This argument, however, was forcefully rejected in the McGuiness[3] case, in which Dixon, J. emphatically declared that :

> '[t]he answer is that it is not a rule of evidence but a practice of refusing in an action of libel against the publisher, etc., of a newspaper to compel discovery of the name of his informants. It 'rests not on a principle of privilege but on the limitations of discovery''.
> [4]

The argument that the newspaper rule has generated a general privilege against source-disclosure by the media has since been equally firmly rejected by the English courts. Thus, for example, in Attorney-General v Clough[5], Lord Parker, C.J.

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1. See, in particular, McGuiness v Attorney-General of Victoria, supra, and British Steel v Granada Television, supra. Both are further discussed below.
2. McGuiness v Attorney-General of Victoria, supra, at 104 - 105, emphasis supplied.
3. Ibid.
4. Ibid, emphasis again supplied.
5. [1963] 1 Q.B. 773, further discussed below.

emphasised that ' the principle had been applied only in interlocutory matters, in which the court's primary concern is with the extent of proper disclosure and in which it accordingly has commensurately wide-ranging discretion to exclude or admit particular evidence'[1]. This could therefore, in his Lordship's view, have 'no bearing on the obligation to disclose at trial itself'[2]. Furthermore[3], in British Steel Corporation v Granada Television Ltd[4], the possibility of any extension of the newspaper rule was emphatically denied by Lord Fraser of Tullybelton[5].

Lord Fraser's reasoning proceeded on five grounds :

(i) the rule applied only to libel actions and could not be extended to other types of proceedings[6];

(ii) the rule applied only at the interlocutory stage;

(iii) since 1949, the rule had applied to all defendants in defamation proceedings and not merely to newspapers;

(iv) the limits of the rule were uncertain (in that there was doubt, for example, as to whether it applied to freelance journalists or the writer of a libellous letter 'to the editor' subsequently published by a newspaper) and his Lordship was 'reluctant to support a

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1. Ibid, at 790.
2. Ibid.
3. See also, for example, Attorney-General v Mulholland and Foster, [1963] 2 Q.B. 477 (C.A.), at 490, where Lord Denning, M.R. emphasised that the rule was based purely on practical considerations, rather than any point of principle.
4. [1980] 3 W.L.R. 774 (H.L.(E.))
5. He was supported in this regard by Lord Wilberforce (at 825, ibid), Viscount Dilhorne (at 833, ibid) and Lord Russell of Killowen (at 854, ibid).
6. Lord Fraser thus refused to follow recent New Zealand authority (further examined below) to the effect that the rule is of general application and applies in all manner of proceedings.

rule whose boundaries [were] so ill defined'[1];

(v) the rule was subject to a number of exceptions - the extent of which was uncertain - and it was accordingly difficult to ascertain whether any such limitation was properly applicable[2].

The only one of their Lordships prepared to acknowledge that the newspaper rule does indeed have a broad-ranging ambit was Lord Salmon (the sole dissentient in the Granada proceedings as a whole). He conceded that 'the long line of cases[3] recited by ... Lord Fraser ... which laid down "the newspaper rule" that the press cannot be obliged to disclose its source of information on discovery were all cases of libel'[4]. In his Lordship's view, however, this had no particular significance and stemmed simply from the fact that 'the vast majority of the litigation in which the press has ever been concerned consists of libel actions'[5]. He stressed that there was no imaginable reason 'why the newspaper rule should be confined to [such proceedings]'[6]; and cited with approval the following important passage from the New Zealand case of Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd[7]

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1. British Steel v Granada Television, supra, at 849.
2. See ibid, at 850.
3. See the authorities cited at p 1101 n 1, above: most of which were expressly mentioned by Lord Fraser, at 848 - 849, ibid.
4. Ibid, at 839.
5. Ibid.
6. Ibid, emphasis supplied.
7. [1980] 1 N.Z.L.R. 163.

(which involved a claim for slander of goods in addition to a claim for defamation) :

> 'Does the newspaper rule apply to the one cause of action as well as to the other? The answer is to be found, in my opinion, upon the general purpose of the rule, based as it is on public interest rather than the private purposes of the news media. And I do not think there can be any reason of public policy or of logic or of fairness for drawing a distinction. The rule itself is not really concerned with the form of litigation but with supporting a proper flow of information for use by the news media'.
> [1]

Lord Salmon expressly endorsed this view, declaring his agreement with the New Zealand judge that '"this newspaper rule" is not confined to libel or any other form of action'[2]. He accordingly concluded that :

> 'in an action against the press for discovery, the plaintiff cannot and never could obtain, and never has obtained, from the defendant his source of information'.
> [3]

Lord Salmon stood alone in this view, however, and the judgment of the Lords as a whole makes it clear that the newspaper rule has only limited significance: and that it has not given rise to a more general and wide-ranging testimonial privilege for journalists.

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1. Ibid, at 166 - 167, per Wodehouse, J.
2. British Steel v Granada Television, supra, at 840.
3. Ibid.

### 12.3.4 The significance of the paucity of precedent compelling disclosure

It has been contended that the paucity of precedents in which the media have been compelled to disclose their sources of information has considerable significance; and that it provides evidence of a general opinio juris that such disclosure should not be ordered. Thus, in the Granada case, the television company emphasised that there had been many leaks of confidential information to the press in the past: and that there was a remarkable dearth of authority demonstrating the media being ordered to disclose the sources of such 'leaks'. Granada contended that this could be explained only on the basis that the law was against compelling such disclosure[1].

Lord Fraser of Tullybelton acknowledged the cogency of this argument, but nevertheless had little hesitation in rejecting it. He pointed out that there were many reasons which could plausibly account for the absence of orders for disclosure: quite apart from the opinio juris urged by Granada. Thus, where the 'leak' was high-placed in government, for example, disclosure might have led 'to scandal and publicity more damaging than the leak'[2]. In illustration, he cited events in 1797, when a leak to the press was thought by Canning (then Under-Secretary of State for Foreign Affairs) to have been made by the king himself[3].

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1. Ibid, at 850.
2. Ibid.
3. Ibid.

In other instances, the reason for non-disclosure might well (in his Lordship's view) have lain in the fact that the 'identity of the informant was not material for the action'[1]: in the sense that appropriate relief could be obtained without this information. Thus, in Abernethy v Hutchinson[2], in which the Lancet had published certain lectures delivered by a professor of medicine to his students (clearly 'leaked' to the journal by one of the latter), whilst it was true that the court had merely prohibited further publication without making any order for the disclosure of the identity of the informant (and had even indicated that it had no right to compel such disclosure), this was readily understandable - according to Lord Fraser - on the basis that the question '[d]id not appear to have been argued; and [that], in any event, ... the identity of the informant was [not] material for the action'[3]. Substantially the same explanation could be put forward (in his Lordship's view) in relation to the case of Prince Albert v Strange[4], where the defendants had sought to publish certain etchings - by the plaintiff and Queen Victoria - which had been obtained in breach of confidence. The court had granted an injunction against publication, but had made no order for the 'discovery of the name of the person who had handed over the etchings to the defendants'[5]. Again, according to Lord Fraser, the fact

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1. Ibid.
2. 1 H. & Tw. 28
3. See again British Steel v Granada Television, supra, at 850.
4. 1 H. & Tw. 1
5. British Steel v Granada Television, supra.

that the plaintiff had not sought such an order did not mean that he was not entitled to such relief in law: but simply that it was not necessary for his primary aim of preventing publication. Lord Fraser accordingly concluded that 'the absence of precedents for the use of discovery for this purpose against the press, ... whilst certainly striking, [could] be readily explained otherwise than on the ground that discovery was not available as a remedy'[1].

This view of these decisions was endorsed by Lord Wilberforce, who agreed that disclosure of the identity of the 'leak' was not ordered in either of these cases because it was not material to the plaintiffs - whose principal concern (in each instance) had been to preclude further (or initial) publication[2].

Lord Salmon, however, took a radically different view of the paucity of precedent for the enforced disclosure by the media of their sources of information. He stressed that 'the only two[3] cases in which the press ha[d] ever been ordered by [the] courts to name its source of information'[4] were those arising out of the Vassall inquiry[5]; and emphasised that this departure from the norm could be readily explained by the fact that disclosure had there been ordered 'to protect the security of the state'[6].

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1. British Steel v Granada Television, supra, at 850.
2. See ibid, at 824 - 825.
3. It may be queried whether Lord Salmon was entirely correct in citing this figure. It appears to overlook the claim for immunity which arose before the Parnell Commission in 1888 (C. 5891) and which was 'flatly rejected by Sir James Hannen sitting with two other judges'. See ibid, at 822, per Lord Wilberforce, and at 831 (per Viscount Dilhorne).
4. Ibid, at 841.
5. These cases are further discussed at p 1111 et seq.
6. British Steel v Granada Corporation, supra.

Notwithstanding Lord Salmon's forceful dissent on this point, it seems clear that - at common law - no particular significance can be attached to the absence of practical instances of the press being ordered to divulge its sources of information. It may nevertheless be queried whether the majority of the Law Lords were correct in explaining the Abernethy and Strange cases on the basis they did; and whether the view of Lord Salmon - that disclosure was not ordered because the law did not entitle the plaintiffs to such relief - is not the more correct. There is undoubtedly a certain air of unreality about the majority's assertion that the plaintiffs, in these cases, would not have been interested in knowing the identity of the 'leaks'.

Thus, in the Abernethy case - to take the first example - it seems difficult to accept that the aggrieved physician would not have wanted to know the name of the student who had so betrayed his confidence; and the trial court's ruling that it did not have power to order disclosure should not be so lightly dismissed as Lord Fraser suggests. Likewise, in the Strange decision, the prohibition of publication would doubtless have served the plaintiff's main aim - but again it seems passing strange that Prince Albert should not have sought to ascertain the identity of the culprit (unless, of course, he had been advised that the law did not entitle him to this information).

The majority judgment of the House of Lords in the Granada case is accordingly open to certain criticism. It must nevertheless be clearly acknowledged that its view - that no signi-

ficance can be attached to the paucity of precedent - stands at present as the authoritative pronouncement of the common law in this regard.

## 12.4. Testimonial Privilege for Journalists Rejected at Common Law

Notwithstanding the limited support for source immunity evinced in the preceding section, the balance of authority is clearly to the opposite effect; and the existence of a testimonial privilege for journalists has been firmly rejected at common law. It is thus apparent that at common law the media may claim no privilege against disclosure of their sources[1] - as emphasised by both the Court of Appeal in Attorney-General v Mulholland and Foster[2] and by the Court of Appeal and House of Lords in British Steel Corporation v Granada Television Ltd[3].

The case of Attorney-General v Mulholland/Foster 'arose out of the conviction of an Admiralty clerk, William Vassal, on charges of communicating secret information to the Russians'[4]. Considerable publicity surrounded these proceedings: and it was suggested that Vassall's mode and style of living ought to have alerted the security services to the risk he presented. Considerable public disquiet was thereby aroused, and the Home Secretary accordingly set up a tribunal of inquiry (under the

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1. It must always be remembered that this is subject to the proviso that the identity of the source is relevant and necessary, as further discussed at p 1126 et seq.
2. Attorney-General v Mulholland; Attorney-General v Foster, [1963] 2 Q.B. 477 (C.A.). Also relevant in this regard is the decision of the Divisional Court in Attorney-General v Clough, [1963] 1 Q.B. 773, briefly described in due course.
3. [1980] 3 W.L.R. 774 (H.L.(E.)).
4. Miller, op cit, p 58.

chairmanship of Lord Radcliffe) to inquire, inter alia, into 'any allegations which reflected upon the honour and integrity of persons who, as ministers, naval officers or civil servants were concerned in the case, and into any neglect of duty by persons who were responsible for Vassall's conduct and his employment on security work'[1].

In the course of its inquiry, the tribunal called upon several[2] journalists to disclose the sources on which they had relied for particular allegations. Mulholland - who had written, inter alia, that 'it was the sponsorship of two high-ranking officials which led to Vassall avoiding the strictest part of the Admiralty's security vetting'[3] - refused to do so, as did Foster, who had alleged that 'V. was known to have bought women's clothing in the West End'[4]. The chairman of the tri-

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1. Ibid.

2. Another of the journalists called upon to testify was Desmond Clough, of the Daily Sketch, who had written an article asserting that 'Vassall's spying led to Russian trawler spying fleets turning up with uncanny accuracy in the precise area of the secret N.A.T.O. sea exercise''. (Attorney-General v Clough, [1963] 1 Q.B. 773, at 776). Clough refused to identify his source for this allegation (on the ground that he would not only be breaking trust in so doing, but would also jeopardise his own career and that of other defence correspondents, who would find it difficult to obtain further 'off-the-record' information from Whitehall). He was convicted of contempt: on the basis that journalists have no testimonial privilege in law; and that there was nothing in the particular circumstances to justify the exercise of judicial discretion against compelling disclosure, especially as the tribunal had considered the information of some importance in the interests of national security. He was sentenced to imprisonment for six months: a penalty which graphically illustrates the harshness of the common law rule.

3. Attorney-General v Mulholland and Foster, supra, at 477 - 478.

4. Ibid, at 478.

bunal certified that the questions were relevant and necessary; and proceedings for contempt were instituted against the journalists. Both were convicted; and they were sentenced to six and three months' imprisonment respectively[1].

On appeal, Lord Denning, M.R. agreed that the questions were relevant and necessary[2]. He rejected the contention that 'a journalist has a privilege by law entitling him to refuse to give his sources of information'[3], and emphasised that '[t]he only profession ... which is given a privilege from disclosing information to a court of law is the legal profession'[4]. He discounted the relevance of the 'newspaper rule'[5]; and, having briefly canvassed the few authorities[6] on the question of source immunity for the press, had no hesitation in concluding that :

> 'There is no privilege known to the law by which a journalist can refuse to answer a question which is relevant to the inquiry and is one which, in the opinion of the judge, it is proper for him to be asked'.[7]

Donovan, L.J. agreed[8] - subject only to the caveat that judicial discretion should not be 'tied hand and foot'[9] and a judge obliged to

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1. Ibid.
2. Ibid, at 488 and 489.
3. Ibid, at 489.
4. Ibid.
5. Ibid, at 490; and see also p 1101 et seq.
6. Those cited were the 'Parnell' case, The Times, 20 February, 1889; the Irish case of O'Brennan v Tully (1935) 69 Ir. L.T. 115; and the Australian case of McGuiness v Attorney-General of Victoria, (1940) 63 C.L.R. 73.
7. Attorney-General v Mulholland and Foster, supra, at 491.
8. Ibid, at 492.
9. Ibid.

to punish as contempt any refusal to answer a question which is technically admissible but where 'more harm than good [might] result from compelling a disclosure'[1].

Dankwerts, L.J. also concurred, emphasising that he thought the law was 'perfectly clear'[2] on the point of journalistic privilege.

In British Steel Corporation v Granada Television Ltd[3] (the facts of which have previously been described[4]), it will be recalled that Sir Robert Megarry, V.C. (in the court a quo) ruled in favour of granting the order sought[5]; and that this was upheld on appeal by Granada to the Court of Appeal[6]. On further appeal to the House of Lords, the majority again ruled in favour of ordering disclosure. Three[7] of the Law Lords expressly and emphatically rejected the existence of any testimonial privilege for journalists; whilst the fourth believed disclosure essential in the circumstances[8]. Only Lord Salmon (as explained above) took a different view: and asserted that the media are indeed entitled to source immunity.

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1. Ibid.
2. Ibid, at 492. Note that the sentences imposed by the trial judge were also confirmed on appeal.
3. [1980] 3 W.L.R. 774 (H.L.(E.)).
4. See p 1095.
5. British Steel v Granada Television, supra, at 796.
6. Ibid, at 775.
7. These were Lord Wilberforce, Viscount Dilhorne and Lord Fraser of Tullybelton.
8. See the judgment of Lord Russell of Killowen, further briefly described below.

The strongest statement of principle against testimonial privilege for journalists is to be found in the judgment of Lord Wilberforce, who emphatically declared that :

> 'the media have no immunity based on public interest which protects them from the obligation to disclose in a court of law their sources of information, where such disclosure is necessary in the interests of justice'.[1]

He further emphasised that all[2] past authorities are 'firmly against [such] immunity'[3]; and that, to reverse them, would 'place journalists (how defined?) in a favoured and unique position as compared with ... other recipients of confidential information and ... assimilate them to the police in relation to informers'[4] - a departure from the status quo which his Lordship saw no reason to justify[5].

Viscount Dilhorne agreed, pointing out that it was clear from the authorities that :

> '[s]ave in respect of the administration of interrogatories in libel and slander actions, newspapers have never been held to enjoy the privilege of not being compellable to

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1. British Steel v Granada Television, supra, at 822.
2. Ibid, at 822 - 823. These are the Parnell Commission case, the cases arising out of the Vassall inquiry, and McGuiness v Attorney-General of Victoria. He was satisfied that the Mulholland and Foster cases were not simply the outcome of the exceptional security interests at stake (as had been contended by Granada) and that dicta in the Court of Appeal supporting immunity had to be read 'in the light of their decision, on the whole matter, that disclosure should be ordered'.
3. Ibid, at 823.
4. Ibid.
5. Ibid.

> disclose the sources of their information. Every time that that claim has been put forward it has been rejected. [And] [s]ince 1949 newspapers no longer receive any special treatment with regard to interrogatories'.
> [1]

Lord Fraser of Tullybelton further rejected the existence of any rule entitling the media to immunity from source disclosure as of right. He emphasised that 'the final decision on whether confidential information discloses such iniquity as to justify its publication must be made by the courts and not by the press'[2].

Lord Russell of Killowen expressed his agreement with all these judgments; but also took pains to stress that his conclusion was based in part on the particular circumstances of the case - especially the wrong which had been done to B.S.C., the fact that B.S.C. would otherwise have no effective remedy and the danger that the concession of source immunity in this instance 'would encourage the doing of injustice'[3].

In the light of these clear statements of principle, the dissenting voice of Lord Salmon - forceful and cogent though it may be - cannot be taken as representative of the common law in any way. The rule that journalists enjoy no special testimonial privilege as of right is thus clear: and it remains

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1. Ibid, at 833, See also the discussion of the 'newspaper rule', above.
2. Ibid, at 852, emphasis supplied. The significance of the disclosure of iniquity is further discussed in due course.
3. Ibid, at 854.

only to examine the exceptions and quasi-exceptions to it which the Law Lords seemed willing to acknowledge.

## 12.5. "Exceptions" to the Disclosure Obligation at Common Law

The judgments in British Steel Corporation v Granada Television Ltd[1] do recognise that, at common law, there are certain exceptions and quasi-exceptions to the general obligation resting upon journalists to disclose their sources of information. Thus, it has been acknowledged that different considerations may apply to the exposure of misconduct and iniquity; and that (in other circumstances) the public interest in the free flow of information may possibly be sufficiently strong as to outweigh the public interest in the proper administration of justice. Moreover, the latter interest has its own limitations: and, accordingly, may legitimately require only the disclosure of information which is necessary for the proper determination of the proceedings. At the same time, it has also been stressed that - in order to qualify for the benefit of these "exceptions" - the media must themselves act 'responsibly' throughout. These ramifications of the general principle are further examined in turn below.

### 12.5.1. Possible source immunity for the exposure of misconduct

In the Court of Appeal proceedings in British Steel Corporation v Granada Television Ltd, it was emphasised by Templeman, L.J.

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1. [1980] 3 W.L.R. 774 (H.L.(E.))

that 'the court will strive to uphold the immunity of the media against discovery'[1]: provided, however, that the media do not mis-use the information they have obtained[2]. He also indicated that even 'mis-use' is not the end of the matter, however, for 'if there is an overwhelming reason to justify publication ... the media may be allowed both to publish the information and [to] conceal the source'[3]. It is, of course, strongly arguable - though the point was not expressly canvassed by Templeman, L.J. - that the exposure of misconduct would provide such an 'overwhelming reason' for publication: and that this dictum accordingly demonstrates implicit support for source immunity in such circumstances.

The issue was further examined (also in the Court of Appeal) by Watkin, L.J. who believed that the journalist's claim to immunity should be governed by the following principles :

(i) if he commits a crime to obtain information then - even if the object of publication is to 'expose iniquity'[4] - he has no immunity;

(ii) if he commits a civil wrong by using confidential information known to have been obtained in breach of contract[5]

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1. Ibid, at 811.
2. This aspect of the judgment is clearly relevant to the further question of the media's obligation to maintain 'responsibility' and is further examined at p 1128 et seq.
3. British Steel v Granada Television, supra, at 811.
4. Ibid, at 814.
5. In referring to 'breach of contract', Watkin, L.J. was clearly influenced by the facts of the Granada case and the 'mole's' breach of his contractual duty (arising from his employment) to B.S.C. It is submitted, however, that the principle is capable of wider formulation, and that 'breach of contract' should be read as extending to any breach of the duty of confidentiality, irrespective of its origin: whether contractual or otherwise.

in order to expose a person 'against whom no iniquity is alleged'[1], he has no immunity;

(iii) if he commits a civil wrong 'for the purpose of exposing ... iniquity which, in the public interest, should be revealed, his claim to press immunity should be granted'[2].

In the House of Lords, Lord Wilberforce - whilst not prepared to accede to the more general principle that the exposure of misconduct entitles the media to maintain source secrecy - was at least willing to acknowledge that 'in cases where misconduct exists, publication may legitimately be made even if disclosure involves a breach of confidence'[3]. Accordingly, if B.S.C.'s actions could be viewed in this light, then publication of the Steel Papers would have been justified, notwithstanding the fact that they had been obtained through a breach of confidence owed to the Corporation by its employee. In the particular circumstances, however, Lord Wilberforce was adamant that B.S.C.'s conduct, at worst, amounted only to 'mismanagement'[4]: so that this pre-condition for lawful publication was not met. The significance of this dictum of Lord Wilberforce is accordingly somewhat difficult to assess. It is clearly obiter; and - moreover - is not directly addressed to the question whether the media may claim a testimonial privilege where it has brought

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1. British Steel v Granada Television, supra.
2. Ibid.
3. Ibid, at 822. This statement is clearly concerned with the antecedent question of whether publication - in the first instance - is lawful. It may nevertheless have some significance in the context of source immunity, as further explained in the text below. It should also be recalled, as previously noted, that Granada had conceded that it had no right to publish - a concession it was compelled to make as a result of its reliance (in the alternative) on the privilege against self-incrimination: but which badly obscured this important issue.
4. Ibid.

misconduct to public attention. Nevertheless, the judgment does also acknowledge that different considerations apply to the exposure of misconduct: and it may be possible to extrapolate from this a measure of support for the exception so clearly recognised by Watkin, L.J.[1].

Viscount Dilhorne also indicated that the exposure of iniquity may justify the publication of information obtained through breach of confidentiality[2]; and the same analysis of the significance of this may be applied mutatis mutandis to his view.

Lord Fraser of Tullybelton went somewhat further. He pointed out that Granada had conceded that publication of the Steel Papers could have been prevented by injunction[3] and that '[t]he scope of the iniquity rule [was] not [therefore] in issue'[4]. However, he also took pains to stress that '[i]f [the Steel Papers] had [revealed 'criminal conduct or anything that could be described as iniquity'[5] on the part of B.S.C.] its disclosure would have been justified and not wrongful'[6]. This, of course, is substantially the same point as previously made by Lord Wilberforce and Viscount Dilhorne: that misconduct would have justified publication notwithstanding the 'mole's' breach of confidence to B.S.C. However, he then went on to

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1. See p 1119 above.
2. British Steel v Granada Television, supra, at 829.
3. This unfortunate concession has previously been noted. One further aspect of it is that it enabled the majority to focus on the 'mole's' breach of confidence as the major issue: and thus explains, to some extent, how no fewer than three of the Law Lords were able to assert that the case had nothing to do with freedom of the press. See ibid, at 821, 829 and 853.
4. British Steel v Granada Television, supra, at 852.
5. Ibid, at 851.
6. Ibid.

assert that 'the existence of the [iniquity] rule should protect the press from being ordered to disclose the identity of their source in any case where the behaviour of the source has been justified'[1]. The qualification that the source's conduct must be 'justified' is somewhat ambiguous; and no further attempt is made in the judgment to elucidate it. Subject to this caveat (the practical significance of which is difficult to gauge), Lord Fraser's dictum does appear to acknowledge that exposure of iniquity may generate immunity from the obligation generally resting upon the press to disclose its sources of information.

Lord Salmon agreed that the media have no obligation to disclose their sources in instances in which they have succeeded in exposing misconduct and iniquity. However, (in keeping with his general view[2]), he further stressed that 'it is a fallacy [to consider] that the press's immunity from revealing its sources of information is confined to cases in which the press publishes information that a plaintiff has been "guilty of crime or fraud or misconduct which ought to be laid bare in the public interest"'[3]. He did not believe that B.S.C. had been guilty of any of the latter - but nevertheless thought that there was 'much else, even more important in all the circumstances, which called aloud to be revealed in the public interest'[4]; and which it became Granada's 'moral duty'[5] to reveal.

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1. Ibid, at 852.
2. See p 1098 above.
3. British Steel v Granada Television, supra, at 843.
4. Ibid. Lord Salmon cites, by way of illustration, 'example after example of failure to meet targets because of mechanical breakdown and design faults'; the 'lateness and inaccuracy of export documentation ... which [was] costing ... the Corporation ... almost certainly millions of pounds'; plus 'errors of estimation up to £200 million'.
5. Ibid.

The judgments in the Granada case thus evidence considerable support for the view that the exposure of iniquity does indeed entitle the media to source immunity. Unfortunately, however, by far the clearest statement to this effect is that of Watkin, L.J. in the Court of Appeal - whilst the Law Lords themselves were considerably more circumspect (with the notable exception, of course, of Lord Salmon). Definitive pronouncement on whether this has been recognised as an exception to the general rule requiring disclosure is accordingly somewhat hazardous: but it is undoubtedly strongly arguable.

### 12.5.2. Possible source immunity for disclosure in the public interest

The judgments in the Granada decision - notwithstanding their general[1] rejection of any right to source immunity on the part of the media - are nevertheless notable for the emphasis placed on the public interest in a free flow of information: and in their recognition that this depends to large extent on source immunity.

Thus, Watkin, L.J. (in the Court of Appeal), stressed the vital role played by journalists generally in maintaing 'a free and well informed society'[2]; and emphasised that 'legal constraints [should not be] needlessly placed upon [their] activities ...

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1. This, of course, is subject to the notable exception of Lord Salmon and (to a lesser extent) of Lord Denning and Watkin, L.J.
2. British Steel v Granada Television, supra, at 814.

[and that] [s]ources [should not] be inhibited from passing on what they believe the public ought to know'[1] - for, if this were to occur, 'it would react intolerably against the public interest'[2].

In the House of Lords, Lord Wilberforce indicated that disclosure should not lightly be ordered[3]; and stressed that the court, in exercising its discretion in this regard, should remember '[t]here is a public interest in the free flow of information, the strength of which will vary from case to case'[4]. This, it need not be emphasised, is hardly a ringing declaration of the fundamental importance of a free flow of information: but it does at least show an awareness of the need for this; and hence may be taken to imply that - in different circumstances (particularly where no 'grievous wrong'[5] of the kind suffered by B.S.C. was in issue) - the public interest in disclosure may possibly have dictated a different conclusion.

Likewise, Viscount Dilhorne conceded that there is indeed a 'public interest in the free flow of information to the press'[6],

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1. Ibid.
2. Ibid.
3. Ibid, at 826. Lord Wilberforce took pains to emphasise both judicial respect for journalistic confidence and the general importance of source immunity. He also stressed the exceptional facts of the particular proceedings, and declared that, in order to obtain a ruling compelling disclosure, the plaintiff would have to satisfy the court that he 'has a real grievance ... which he ought to be allowed to pursue and [which] outweigh[s] whatever public interest there may be in preserving the confidence'.
4. Ibid, at 827.
5. Ibid.
6. Ibid, at 829.

which might be 'restricted, if not stopped, if the identity of the [mole] ... [was] disclosed'[1]: but thought that this, in the particular circumstances, could not outweigh the equally well recognised 'public interest in the preservation of privacy and confidentiality'[2].

The public interest in the free flow of information (though, in his Lordship's view, superceded in the particular circumstances by the need to preserve confidentiality within a business organisation) was also emphasised by Lord Fraser of Tullybelton[2]: whilst Lord Russell of Killowen likewise pointed to the danger of the 'public interest in the free flow of information'[3] being impaired through disclosure of media sources (but thought that the 'gross wrong'[4] done to B.S.C. necessitated an order for disclosure in the instant case).

Lord Salmon's entire judgment is an emphatic affirmation of both the general principle of source immunity and of the vital public interest in the publication of the Steel Papers in the particular circumstances. Thus, in addition to the inefficiency and mismanagement earlier described[5], Lord Salmon stressed that B.S.C. was in a 'parlous'[6] condition - having incurred vast losses (the brunt of which fell on the taxpayer) and failing, despite

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1. Ibid.
2. Ibid, at 853.
3. Ibid, at 854.
4. Ibid.
5. See p. 1121, n. 4.
6. British Steel v Granada Television, supra, at 836.

massive loans for investment, to match the performance and output of its competitors[1]. It followed that Granada (in his view) had been right to consider that 'if any of [the Steel] [P]apers exposed the faults and mistakes which were causing the immense losses made by B.S.C., it would be Granada's public duty to disclose the contents of those papers to the public'[2]. He further emphasised that '[t]he freedom of the press depends on this immunity'[3]: and that, '[w]ere it to disappear, so would the sources from which its information is obtained'[4]; with the result that 'the public [would then] be deprived of much of the information to which the public of a free nation is entitled'[5]. In short, in Lord Salmon's view, source immunity is in any circumstances an important safeguard of the public's right to be informed of the grave and weighty issues of the day. In the particular instance, a free flow of information to society was especially essential, for only in this way could the 'parlous' condition of B.S.C. be revealed and measures implemented to improve the position'[6].

Lord Salmon stands alone in this viewpoint amongst the Law Lords. It is nevertheless noteworthy, however, that the remainder of the House laid considerable emphasis on the impor-

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1. Ibid.
2. Ibid, at 837.
3. Ibid, at 846.
4. Ibid.
5. Ibid.
6. See ibid, at 843. It is interesting to note that Lord Salmon was the only one of the Law Lords to advert to the fact that the broadcast may have had a salutary effect on B.S.C. His Lordship thus pointed out that - since the broadcast - 'much ha[d] been done to put B.S.C. on the road to recovery'.

tance of a free flow of information to society via the media. Thus, whilst clearly not prepared to concede that this conferred a right to source immunity on the media, the Law Lords have indeed indicated that it is an important consideration: and one which should always be taken into account by the courts in exercising their discretion as to whether to exonerate the media from the obligation to disclose their sources. Hence, it may be inferred that - in different circumstances, untainted by any element of wrongdoing[1] - the public interest in publication may well tip the balance in favour of according the media the source immunity on which the free flow of information to society so largely depends.

12.5.3. No obligation to disclose unnecessary information

It is not, perhaps, entirely apposite to examine - within the head of "exceptions" - the absence of any obligation to disclose information which is not necessary to the proceedings in question. The need for the information requested is a pre-condition to the obligation to disclose arising in the first instance: so that the absence of such need should not, strictly, be viewed as constituting an exception to an obligation already in force.

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1. The wrong done to B.S.C. is a theme which constantly recurs in the majority judgments: and there is accordingly considerable perspicacity in the comment (by Andrew Nicol, 'British Steel Corporation v Granada: Naming Moles' [1980] Public Law, pp 163 - 168, p 165) that 'a striking feature of the case is its echo of the schoolboy's contempt for the sneak'. It seems clear that this factor played a large part in the Lords' decision and that - without it - the outcome might possibly have been different.

The practical outcome is, however, essentially the same: and the media (in circumstances where the information is not relevant or would make no difference to the outcome of proceedings) have no obligation to disclose their sources.

The point has recently been graphically demonstrated by the case of Attorney-General v Lundin[1]. The defendant was a journalist who - following certain investigations conducted by him - published an article in Private Eye which resulted in the prosecution of a police sergeant under the Prevention of Corruption Act of 1906. During the course of this trial, the defendant refused to reveal his source of information (regarding a document of particular importance for the prosecution) on the basis that this 'would have been a breach of confidence and contrary to his professional ethics as a journalist'[2]. It so transpired, however, that none of the prosecution witnesses was able to provide any evidence of substance, so that the prosecution's case was clearly tenuous in the extreme: and it was apparent that 'revelation of the source of information could not have assisted the Crown'[3]. It was thus clear (by the time the defendant was ordered, and refused, to answer the question) that 'his revealing of his source could not have served any purpose and would have been rendered useless by the absence of other related and essential evidence'[4]. Accordingly, the court (in proceedings

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1. The Times, 20 February, 1982.
2. Ibid.
3. Ibid.
4. Arlidge & Eady, op cit, p 202.

for contempt instituted by the Attorney-General against the defendant) - whilst emphasising that journalists have no right to immunity from disclosure of sources - concluded that, in the particular circumstances, no contempt had been committed. The answer to the question could serve no useful purpose: and the question was therefore unnecessary (even though relevant) - and the journalist was under no duty to answer it.

12.5.4. The need for responsibility on the part of the media

A further ramification of the common law obligation of source disclosure and its possible exceptions emerges with particular force through the various judgments in British Steel Corporation v Granada Television Ltd[1]. This is the duty of the media to act responsibly in their collection and dissemination of information: failing which they cannot expect judicial discretion to be exercised in favour of granting source immunity.

The point was stressed with particular force by Lord Denning, M.R. in the Court of Appeal. It may be recalled that Lord Denning would have been prepared to grant Granada the immunity it sought[2]- had it not been for its irresponsible behaviour: manifested (in Lord Denning's view) in its failure to give B.S.C. more warning of its intention to publish the Steel Papers, in the bullying tactics employed by it in interviewing the Chairman of B.S.C. in the course of the broadcast and -

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1. [1980] 3 W.L.R. 774 (H.L.(E.)).
2. See p 1098 above.

in particular - in its 'disgraceful mutilation'[1] of the papers[2].

The need for responsibility on the part of the media as a pre-condition to a successful claim for immunity was also stressed by the House of Lords. Thus, the majority took pains to emphasise the wrong done to B.S.C. and the fact that Granada was party to that wrong: at least to the extent of its knowledge that the Steel Papers had been obtained in breach of the 'mole's' duty of confidence to his employer[3]. Only Lord Salmon took a different view - on the facts of the case - of Granada's alleged irresponsibility. He thus expressly disapproved Lord Denning, M.R.'s assessment of the facts in this regard[4], but - unfortunately - made no further comment on whether he agreed with Lord Denning that the most important criterion for determining

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1. It may be recalled that Granada had removed all marks from the Papers (which might have served to identify the 'mole') before returning them to B.S.C.

2. British Steel v Granada Television, supra, at 805. Essentially the same view was also expressed by Watkin, L.J., who went so far as to state that ' b[y]their act of mutilation alone Granada [was] ... disentitled to immunity'. See ibid, at 816.

3. See ibid, at 827 (per Lord Wilberforce); and see also the judgment of Viscount Dilhorne (at 835 - 836) who described 'the person who took the documents and gave them to Granada ... [as] clearly a wrongdoer, if not a thief' - and emphasised that Granada could 'scarcely claim' to have been innocent, for they 'must have known that the taker of the documents had no right to give them to them'. This, in Viscount Dilhorne's view, was one of the principal reasons for refusing immunity: for, to hold otherwise, would 'constitute a charter for wrongdoers' - and this he was not prepared to countenance.

4. See ibid, at 842. Thus, Lord Salmon did not think it 'of any real importance' that Granada left it so late to tell B.S.C. of its intention to broadcast excerpts from the Papers, nor that they gave B.S.C.'s Chairman no opportunity to see the script before the broadcast. He also disagreed that 'the conduct of the interview ... [had been] deplorable' (for bullying B.S.C.'s Chairman) and opined, on the contrary, that the latter had been fairly treated. He also rejected the view that the mutilation of the Papers had been 'disgraceful' - pointing out (at 839) that it had been essential to maintain the anonymity of the source, as promised to him.

whether judicial discretion should be exercised in favour of source immunity lies in the degree of responsibility displayed by the media[1].

To summarize, then, the further ramifications of the media's obligation to disclose their sources of information, it is apparent that the exposure of misconduct or iniquity may entitle the media to immunity; and (though this is considerably less certain) that strong public interest in publication may also have this result. It is further clear that - for the disclosure obligation to arise in the first instance - the information must be relevant and necessary to the proper determination of the proceedings. In addition, it is apparent that the media must act responsibly, failing which they will forfeit any claim to immunity they may otherwise have enjoyed.

## 12.6. The Need for Reform of the Common Law

The need for reform of the common law is a matter of considerable controversy: and strong arguments may be put forward on both sides. These accordingly merit brief examination: and it is proposed to begin by focusing on the arguments in favour of the need for reform.

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1. Cf Allan C Hutchinson, 'Moles and Steel Papers', (1981) 44 Modern Law Review, pp 320 - 327, p 323, who asserts that Lord Salmon agreed with Lord Denning, M.R. that 'responsibility' is essential to source immunity. Lord Salmon made no such express affirmation; and his examination of the extent of Granada's 'irresponsibility' on the facts reveals at most an implict acceptance of the need for responsibility.
   As regards the alleged need for responsibility, it should also be noted that Watkin, L.J. was satisfied that the commission of a civil wrong (though not a crime) for the purpose of exposing iniquity which needs to be revealed in the public interest does not jeopardise a claim to source immunity - and such conduct is surely the antithesis of 'responsible' behaviour. See British Steel v Granada Television, supra, at 814.

12.6.1. Arguments in favour of the need for reform

There are three principal arguments in favour of reforming the law so as to accord source immunity to the media. The first lies in the crucial importance of investigative journalism and a free flow of information to society. The second derives from the dependence of effective investigative journalism on the maintenance of source immunity. And the third is to be found in the invidious position in which the journalist is otherwise placed.

12.6.1.1. The importance of investigative journalism and a free flow of information to society

The importance of investigative journalism and a free flow of information to society are, firstly, graphically demonstrated by the Granada decision itself. The 'parlous' condition of B.S.C. has been noted on a number of occasions in the course of the preceding discussion: and it is not proposed to reiterate the point at any length. Nevertheless, it is worth emphasising that the Corporation was losing staggering sums of money[1], that even larger amounts were being poured into it[2], that the Steel Papers revealed inefficiency which was totally inexcusable and

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1. See ibid, at 836, where Lord Salmon pointed out that B.S.C. had lost £700 million in 1979 and was expected to lose a further £450 million in 1980.

2. See ibid. The sums so lost were then being lent to B.S.C. interest-free by the nation's taxpayers, as well as further sums (totalling £3 billion) for the provision of new plant and equipment.

and highly costly[1], that the problem had been exacerbated to some extent by government intervention[2] (notwithstanding public disclaimers of such involvement) and that the broadcast appeared to have had considerable beneficial impact - and had clearly contributed to the measures thereafter taken to 'put B.S.C. on the road to recovery'[3]. It therefore needs no further emphasis that the public interest in the publication of the Steel Papers was vital and real.

Looking beyond B.S.C. itself and the public concern with its affairs, it is clear that investigative journalism - in more general terms - plays a role of vital importance in society. The 'classic' example of the importance of such reporting is, of course, provided by the Watergate affair in the United States, where revelations (by reporters of the Washington Post and New York Times) regarding the "break-in" at Democratic Party offices led to the exposure of wide-ranging corruption and abuse of office; and culminated, ultimately, in the resignation of Richard Nixon from the Presidency[4]. Without investigative jour-

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1. See ibid, at 843. Particularly disturbing, perhaps, of the various examples of this cited by Lord Salmon is the 'lateness and inaccuracy of export documentation', which was costing the Corporation millions of pounds. There could be no excuse for this.

2. In this regard, it is somewhat disturbing to note Lord Wilberforce's grudging concession that there may 'perhaps' have been a public interest in informing the public of the government's attitude towards settling the strike. (See ibid, at 827). Any involvement by government in the matter would seem to be of the utmost public concern: raising, as it does, fundamental questions as to the benefits of nationalisation of key industries.

3. See ibid, at 843, per Lord Salmon.

4. Other examples spring readily to mind: including press investigation and exposure of corruption in the Gomwalk and Tarka affairs in Nigeria, described at p 293 above; and the 'Muldergate' affair in South Africa in which revelations by the press of secret funding of pro-government propaganda played an important part in the resignation of Prime Minister Vorster.

nalism, it is clear - as warned by Lords Denning and Shaw in the Granada case - that '[w]rongdoing [may] not be disclosed ... [and] [m]isdeeds in the corridors of power - in companies[1] or in government departments - [may] never be made known'[2].

Other judgments in the Granada decision are admittedly more grudging in their recognition of the importance of investigative journalism[3]; but this should not be allowed to obscure the reality, acknowledged (despite certain misgivings[4]) by Sir Robert Megarry, V.C. that '[the] activities [of the media] in [the] field [of investigative journalism] are in the main beneficial to the public'[5].

12.6.1.2. The dependence of investigative journalism and a free flow of information on source immunity

Investigative journalism is thus clearly important to society; and it is equally apparent that its efficacy depends, in considerable measure, on the journalistic ethic of source secrecy: to which the law of contempt accords such scant regard. Thus, in the Granada case itself, it is clear that the 'mole' - highly motivated as he was to bring the mismanagement of B.S.C. to public attention - nevertheless set great store by Granada's

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1. With the growth in power and influence of multinational corporations, abuse of power in the corridors of companies is of no mean concern to society at large.
2. British Steel v Granada Television, supra, at 840.
3. See ibid, at 821, where Lord Wilberforce acknowledges that '[i]nvestigatory journalism ... in some cases may bring benefits to the public'.
4. See ibid, at 793, where Megarry, V.C. submits that investigative journalism is not always beneficial, as it may be groundlessly defamatory, or have the effect of prejudicing fair trial.
5. Ibid.

undertaking to maintain confidentiality; and may well have decided against handing over the Steel Papers to the television company without the security of that assurance. Again, in the 'classic' example of Watergate, it is common knowledge that journalists from the Washington Post relied for their information to a considerable extent on the mysterious 'Deep Throat'; and it is reasonable to infer that he would not have been prepared to divulge his knowledge without the guarantee that his identity would remain a secret. It must of course be acknowledged that it is extremely difficult to determine, empirically, the importance of 'source secrecy' in maintaining the flow of information to the media. How can the number of potential 'moles' deterred from approaching the media as a result of the Granada decision be quantified? However, as Nicol[1] points out, '[r]esearch in the United States suggests that journalists themselves place a very high value on respecting confidentiality'[2]; and, in logic and principle, there is undeniable cogency in Lord Salmon's assertion that, without journalistic immunity, 'the press's sources of information would dry up and the public would be deprived of being informed of many matters of great public importance'[3].

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1. See Nicol, op cit, p 167, citing Blasi, 'The Newsman's Privilege: An Empirical Study', (1971-72) 70 Mich. L.R. pp 229-84,271.
2. Ibid.
3. British Steel v Granada Television, supra, at 836.

12.6.1.3. The invidious position in which the journalist is otherwise placed

Without source immunity, the position of the individual journalist who has conducted an investigation in the course of his professional duties and is then called upon to testify regarding his sources is invidious indeed. It must always be remembered that it is a fundamental tenet of his professional ethics that he should never reveal his source. To demand that he should do so is therefore to place him in an intolerable dilemma: and many journalists have suffered imprisonment rather than betray such confidence. The words of Desmond Clough - called upon to testify during the course of the Vassall inquiry[1] - are salutary to recall[2] in this regard. His refusal to reveal his source stemmed from three factors: that he would be breaking trust in naming his Whitehall confidante, that his professional career as a defence correspondent would be ruined if he supplied this information as no further 'off-the-record' tips would come his way, and that he would also thereby jeopardise the careers of all other defence correspondents who would likewise find their own sources 'drying-up'. Leaving aside all question of the loss to society if this were to occur and focusing on the purely personal level alone, it is totally unacceptable that the law should place any individual on the horns of such a dilemma. It may be countered that the journalist is not alone in this: and that doctor, priest and banker

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1. See p 1111.
2. See p 1112, n 2.

may find themselves facing the same difficulty. This, of course, is true: but it does not render the position of the journalist any the less invidious. In addition, the problem is likely to be faced more often - in practice - by journalists (particularly those involved in investigative work) whose daily lives revolve around the collection of information which (by definition) touches on issues of importance to society and which may well become the subject of proceedings. The journalist is accordingly peculiarly vulnerable to the demand that he should disclose confidential information - and it is therefore appropriate that he should be given a special protection.

### 12.6.2. Arguments against the need for reform of the common law

Against the arguments in favour of reform are posed a number of counter-contentions: that the recognition of journalistic privilege would open the flood-gates to similar claims, that it may encourage the breach of duties of confidentiality, as in the Granada case, that the proper administration of justice is an overriding public interest, and that the difficulty of defining the category of persons entitled to such privilege is intractable. Each of these objections accordingly merits brief further consideration.

#### 12.6.2.1. Reform would open the flood-gates

It is contended that reform of the law cannot be effected in relation to the media alone; and that the extension of a testimonial privilege to journalists would open the flood-gates to a myriad similar claims from other professions, in which the maintenance of confidentiality likewise has considerable impor-

tance. Prominent amongst such contenders would, of course, be the medical and banking professions as well as the clergy.

However, given the importance of investigative journalism and the extent to which its efficacy depends upon source secrecy, it should be acknowledged that the need for confidentiality between the journalist and his source stands in an entirely different category from that between doctor and patient, priest and pentitent, banker and customer. The latter relationships clearly thrive best in an atmosphere of confidentiality: but it is more readily acceptable that society (within these spheres) may require the breach of that trust in order to serve larger and more pressing interests[1]. It is a mistake, however, to equate the interaction between the journalist and his source with the other confidential relationships listed above. There is a vital difference in the roles performed by the media and the members of these other professions. There is, of course, an important public interest in respecting the confidences of the bank customer, the penitent or the patient - but this is of a totally different order from the public interest in maintaining the secrecy of media sources. Investigative journalism has an importance which is unique: and its claim to source immunity should accordingly be recognised (not only as irresistible)

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1. Even this may be open to doubt, as evidenced (for example) by the strong opposition recently voiced in the United Kingdom to proposed legislation which would give the police wide powers of obtaining access to information and would accordingly undermine the confidential relationship between the clergy and those who, in confidence, seek their aid.

but also as standing in a class of its own: so that extension of immunity would not necessarily open the flood-gates to similar claims.

12.6.2.2. Reform would encourage breach of duties of confidentiality

It may also be contended that recognition of immunity may encourage the breach of confidentiality (such as occurred in the Granada case itself): and that this is not to be tolerated. It is submitted, however, that breach of confidentiality must always be weighed against the public interest in disclosure - and that the latter may be more important in certain situations. It must also be acknowledged that, in many instances, it is only those with 'inside' knowledge (through employment or membership of a particular organisation) who are able to provide the information on which investigative journalism depends. Inevitably, such an employee or member will owe an obligation to the organisation not to disclose its inner workings to the outside world. But if its inner processes call for disclosure in the larger public interest, the fact that this will involve a breach of confidentiality should be recognised as a 'necessary evil': and should certainly not constitute grounds (as indicated by the Law Lords and by Lord Denning in Granada[1]) for depriving the media of any claim to source secrecy.

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1. See p 1128 et seq.

It must, of course, also be acknowledged that breach of confidentiality is a serious matter; and there is a real public interest in maintaining relationships of trust in organisations of all kinds. It is a sufficient safeguard, however, to limit source immunity in the face of breach of confidence to those instances in which the public interest in disclosure is clear: where (to cite the words of Lord Wilberforce[1]), the information is not only of interest to the public but is also in the public interest to make known. This distinction - admittedly difficult to define in the abstract in categoric terms - should not present insuperable difficulties in practice: as the experience of the courts in relation to the defence of 'fair comment'[2] in defamation proceedings clearly demonstrates.

Furthermore, the importance of maintaining confidentiality must also be weighed against the declaration, in Annesley v (Earl) Anglesea[3], that ' no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed ... to destroy the public welfare'[4]. The force of this contention is undeniable: and any person who finds himself privy to such secret design should not be compelled - through alleged duty of confidentiality - to

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1. British Steel v Granada Television, supra, at 821.
2. See Chapter Six above, where the elements of this defence in the civil law of defamation are described. It will be recalled that one requirement of the defence is that the comment should be put forward 'in the public interest'. The courts accordingly have considerable experience in applying this amorphous concept to the facts of particular cases: and have not encountered intractable difficulty in distinguishing between the two types of information described in the text above.
3. (1743) L.R. 5 Q.B. 317.
4. Ibid.

keep his own counsel. His overriding obligation is clearly to inform society of the risk it faces: and any breach of confidentiality this entails should be recognised as being of comparatively minor significance.

12.6.2.3. Reform would undermine the proper administration of justice

Another major argument against reform of the present law lies in the contention that the due administration of justice demands that all relevant and admissible evidence be placed before the courts in their task of dispute-resolution and upholding the laws of society. There is undoubted merit in this consideration; but it must nevertheless be acknowledged that the public interest in the proper administration of justice is not the only important factor at play. There is also a vital public interest in maintaining a free flow of information: and it is submitted that - to the extent that the proper administration of justice may suffer through allowing journalistic immunity - this must (in general) be acknowledged as the lesser of two evils. There may, of course, be exceptional circumstances (for example, where vital security interests are clearly[1] at stake), in which disclosure may have to be ordered. In such instances, however, the extent of disclosure required should be limited to that which is indeed necessary to avert the threatened

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1. It must, however, be remembered that the interests of state security have a tendency to escalate: and that a firm check must be kept on this. Thus, for example, in situations such as those in issue in the Clough, Mulholland and Foster cases, the interests of state security should not be considered sufficiently compelling to warrant an order for disclosure. This is particularly so in the case of Clough, where there was evidence that Russian trawler fleets regularly turned up in the area of N.A.T.O. sea exercises quite independently of any aid from Vassall's spying.

evil; and should also be restricted to information which cannot be obtained through any other means. Moreover, further safeguards should be applied: such as the hearing of evidence in camera, or the prohibition of its reporting by the media - for although these restraints on media freedom are not lightly to be tolerated, they may nevertheless - in such circumstances - be appropriate in order to help preclude the 'drying-up' of media sources in the future.

### 12.6.2.4. Reform is impracticable because of difficulties of definition

A further major obstacle alleged to lie in the way of reform is the difficulty of defining the category of persons to whom testimonial privilege should be accorded. Thus, in the Granada case itself, Lord Fraser of Tullybelton considered this difficulty one of the major reasons for refusing the 'newspaper rule'[1] a wider ambit. He thus cited, with approval, the misgivings also expressed in this context by the United States' Supreme Court in Branzburg v Hayes[2], in the following terms:

> 'The informative function asserted by representatives of the organised press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential

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1. See p 1101 et seq., especially at p 1104.
2. 408 U.S. 665 (1972).

> sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury'.[1]

A similar concern was also voiced by Sir Robert Megarry, V.C. (in the court a quo in the Granada case), who queried whether the alleged immunity applied also to 'free-lance journalists or ... television reporters', or 'to an author gathering material for a book', or to 'a crank or busybody preparing a pamphlet' - or even to 'manufacturers or advertising agents engaged in market research'[2].

It is submitted, however, that these concerns have been placed too high in these passages, and that the difficulty of drawing an appropriate line is not insuperable, as demonstrated by the 'shield laws' of the United States of America. Thus, for example, the 'shield' legislation of Alabama State confers immunity on any person 'engaged in, connected with or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity'[3]. This is undoubtedly a practical compromise, and one which reflects the reality that - although it may be artificial in principle to distinguish between journalists and other writers - there is in practice an important difference in the roles which they perform and the audiences they reach. There is, accordingly, sound sense in reducing the difficulties of defining who is entitled to immunity

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1. Ibid, at 705, cited by Lord Fraser in British Steel v Granada Television, supra, at 849.
2. British Steel v Granada Television, ibid, at 786.
3. Ala. Code, Tit 7, Para 370, 1960.
   A further possible solution is provided by the United Kingdom Contempt of Court Act, 1981, discussed at p. 1144 below.

by adopting the kind of test described above. Moreover, the definition does not appear to have generated particular difficulties in its practical application: though this is clearly a possibility that cannot entirely be discounted[1]. No law, however, can attempt effectively to regulate every conceivable variation in factual circumstance: and it seems far preferable to adopt this kind of test than to reject reform altogether because of difficulties of definition.

In summary, it is accordingly submitted that the arguments against reform of the law do not stand up to close scrutiny - in that the difficulties on which they are founded are capable of appropriate resolution. By contrast, the advantages of conferring source immunity are clear and compelling: and it is accordingly submitted that the rule compelling disclosure is now ripe for reform.

This, in turn, raises the further question of the direction such reform should take; and, in this regard, some attention must now be directed to the recent change in the law introduced in the United Kingdom in the Contempt of Court Act, 1981.

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1. This possibility is graphically demonstrated by recent revelations regarding possible abuse in President Reagon's preparation for his important'television' debate with President Carter - which have been made in a book recently published rather than through the media. (The media are now, however, playing a highly significant role in pressing for full investigation of the allegations: and it is noteworthy that the F.B.I. has now launched 'an inquiry into how President Reagon's election campaign aides got President Carter's briefing papers for their crucial television debate in October 1980'. See The Times, 1 July 1983.

12.7. Reform Effected in the United Kingdom

In the United Kingdom, the need for reform of the common law in this context has been acknowledged: and an attempt has been made to redress its deficiencies through the Contempt of Court Act, 1981. This now, in section 10, provides :

> 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime'.[1]

The key criterion is thus that disclosure must be necessary (in the furtherance of certain interests, as further discussed below).. To some extent, therefore, the section does no more than give statutory effect to a well-established common law rule that a witness need not answer a question which is unnecessary to the ultimate resolution of the proceedings - as recently confirmed in the case of Attorney-General v Lundin[2]. The new provision is significant, however, in that it makes clear that a witness who refuses to answer a question relating to 'the source of information contained in a publication for which he is responsible'[3] is not automatically to be considered in contempt of court. This should be contrasted with 'the rule governing other types of court order, where it has long been established that

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1. s 10, Contempt of Court Act, 1981.
2. The Times, 20 February, 1982, previously discussed at p 1127.
3. See s 10, supra.

the order must be implicitly obeyed unless and until it is duly set aside or discharged'[1]. Instead, section 10 makes it clear that the question must first be shown to be necessary. This must be established 'to the satisfaction of the court'[2]; and it seems clear that the onus of so doing lies 'upon the person requiring the answer'[3].

The section appears to widen, however, the grounds upon which disclosure may legitimately be considered necessary. It may be recalled that (in Lord Salmon's view, at least), the only circumstances in which it had previously been acknowledged that disclosure of a journalist's sources could validly be ordered were those involving public security[4]. Section 10 now provides that disclosure may be necessary, in addition, 'in the interests of justice ... or for the prevention of disorder or crime'[5]. This list is interesting. First, the reference to the interests of 'justice' seems tautologous, since it has always been a fundamental principle that it is the public interest in the proper administration of justice which may require the disclosure by journalists of their sources. Secondly, the references to 'disorder' and 'crime' are extremely broad - especially the former: and may well prove, in practice, to be unduly restrictive of the journalist's "entitlement" (if such it may be termed under section 10) to maintain the secrecy of his sources.

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1. Arlidge & Eady, op cit, p 202.
2. See s 10, supra.
3. Arlidge & Eady, supra, p 203.
4. See British Steel v Granada Television, supra, at 846; and see also the discussion of this aspect of his judgment at p 1100.
5. See s 10, supra.

In Nigeria, no such attempt at reform has yet been made, and here the common law - in principle - continues to hold sway. Important rulings against the constitutionality of the common law have recently been made by the High Court of Lagos State, and these are further discussed in due course. Greatly as these decisions are to be welcomed, they do not, however, eliminate all difficulties, as further explained below. Hence, it may still be appropriate to effect reform of the law through legislation. If this course is adopted, then section 10 of the United Kingdom Contempt of Court Act 1981 provides one example which Nigeria may decide to follow. It is submitted, however, that it would be preferable to adopt 'shield laws' similar to those enacted in the United States of America. The United States' approach accordingly now merits some examination: both as a useful background to further discussion of the constitutionality of the common law rule in Nigeria; and for the insight it provides into additional ways in which the problem of source immunity for the media may be tackled.

## 12.8. The Contrasting Approach of the United States of America

The contrasting approach of the United States is evident not so much[1] in the common law (under which the Supreme Court has, on a number of occasions, ruled that journalists are not entitled

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1. There are, however, certain decisions in which the courts have exonerated journalists from disclosure of their sources, as explained below.

to testimonial privilege against disclosure of their sources) - but, rather, in the 'shield laws' which have been adopted by a number of states in order to protect journalists in this regard[1].

The first important decision on the common law in this context is that in Garland v Torre[2]. Here, Marie Torre - a columnist for the New York Herald Tribune - refused to name the source of a statement alleged to be defamatory of the actress Judy Garland. Ms Torre's conviction for contempt was upheld on appeal on the ground that the public interest in the fair administration of justice prevailed, in these circumstances, over her claim to privilege under the First Amendment[3]. Her application to the Supreme Court for certiorari was denied[4].

Likewise, in 1968, the Supreme Court denied certiorari in the case of State v Buchanan[5]. Here, Annette Buchanan described (in a college newspaper) the use of marijuana by students; and was asked to name her sources to a grand jury investigating drug use. On refusing to do so, she was convicted of contempt and this was confirmed on appeal to the Oregon Supreme Court[6].

In 1972, the Supreme Court ruled for the first time on whether the First Amendment protects journalists against disclosure of

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1. Some 26 states in the United States 'now have "shield laws" which to varying degrees confer a legislative immunity'. See Nicol, op cit, p 167, citing Robert Sack, Libel, Slander and Related Problems, (1980), App. V.
2. 259 F 2d 545 (2d Circ. 1958)
3. See Nelson & Teeter, Law of Mass Communications, 3rd ed., New York, 1978, p 327.
4. 358 U.S. 910, 79 S. Ct. 237 (1958).
5. 392 U.S. 905, 88 S. Ct. 2055 (1968).
6. See Nelson & Teeter, supra, p 315.

their sources. This was in the case of Branzburg v Hayes[1], involving proceedings against three journalists who had refused to testify before grand juries. Branzburg, a reporter for the Louisville Courier-Journal, had described the process of making hashish from marijuana (which he had been shown by two people) and refused to identify his sources to a grand jury. Pappas, a television reporter from New Bedford, refused to describe to a grand jury his visit to Black Panther headquarters, and Caldwell, a reporter for the New York Times in San Francisco, 'who had covered Black Panther activities regularly for some years'[2] refused to appear before a grand jury at all. The lower courts found that qualified privilege attached to Caldwell[3], but that neither Branzburg[4] nor Pappas[5] were entitled to protection. On appeal to the Supreme Court, it ruled (by a majority of 5:4) that the Branzburg and Pappas decisions should stand and that the ruling in Caldwell's favour should be reversed[6].

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1. 408 U.S. 665, 92 S. Ct. 2646 (1972).
2. See Nelson & Teeter, supra, p 327.
3. Thus, 'the federal district court of California and the Ninth Circuit Court of Appeals ruled that the First Amendment provided a qualified privilege to newsmen and that it applied to Caldwell'. (Nelson & Teeter, ibid, pp 327 - 328). The latter court accepted Caldwell's contention that he would lose the confidence of the Black Panther movement if he so much as entered the grand jury chambers: and that society would be the loser if this transpired. See Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970); Caldwell v U.S. 434 F. 2d 1081 (9th Cir. 1970).
4. The Kentucky Court of Appeal refused Branzburg protection under either Kentucky's shield law (as further explained below) or the approach adopted by the Ninth Circuit Court of Appeals in relation to Caldwell. See Branzburg v Pound, 461 S.W. 2d 345 (Ky. 1971).
5. The Supreme Judicial Court of Massachusetts rejected any First Amendment privilege; and there was no shield law to apply. See In re Pappas, 358 Mass. 604, 266 N.E. 2d 297 (1971).
6. See Nelson & Teeter, supra, p 328.

The majority pointed out that journalists enjoy no special status designed to facilitate news gathering in other respects[1]; and emphasised that testimonial privilege for journalists had always been denied in the past because of the overriding public interest in securing as much information from witnesses in grand jury or trial proceedings as possible[2]. The majority was not prepared to extend the categories of recognised privilege[3]: for it was not convinced that 'there would be a significant constriction of the flow of news to the public if the Court reaffirm[ed] the prior common law and constitutional rule regarding the testimonial obligations of newsmen'[4].

In a separate concurring opinion, Justice Powell took pains to stress, however, that this did not mean that 'newsmen ... are without constitutional rights with respect to the gathering of news or in safe-guarding their sources'[5]. He thus asserted that 'the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection'[6].

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1. This was in refutation of the argument that the news-gathering process requires special protection under the First Amendment to preclude sources from 'drying up'. The majority stressed that the media have no right of special access to information, as evidenced - for example - by their regular exclusion from grand jury proceedings and the meetings of executive bodies. Hence, they could not claim to be entitled to special treatment in this regard.
2. It stressed that 'the First Amendment claim to privilege had been turned down uniformly in earlier cases'. Nelson & Teeter, op cit, p 328.
3. It pointed out that 'the only constitutional privilege for unofficial witnesses is the Fifth Amendment privilege against self-incrimination, and ... declined to create another'. Nelson & Teeter, ibid, pp 328 - 329, citing the judgment at 689 - 690.
4. Branzburg v Hayes, supra, at 693. The court further stressed that this was supported by the lessons of history, which showed that 'the press had operated and thrived without common law or constitutional privilege since the beginning of the nation'. Nelson & Teeter, supra, p 329.
5. Branzburg v Hayes, supra, at 709.
6. Ibid, at 710.

Justice Douglas, dissenting, declared that journalists enjoy complete immunity from testifying under the First Amendment and have 'an absolute right not to appear before a grand jury'[1]. Justice Stewart, also dissenting - and writing for himself and two others - was not prepared to go so far. In his view, journalists are entitled to qualified privilege and could only be compelled to testify if it was shown that 'the information sought [was] clearly relevant to a precisely defined subject of governmental inquiry[2] and that ... there [was] not any means of obtaining the information less destructive of First Amendment liberties'[3].

Notwithstanding the majority view, however, all clearly was not lost from the standpoint of the media. Thus, in Baker v F & F Investment Co[4], a journalist who had revealed racial discrimination in the practice of certain landlords and speculators was asked by civil rights proponents to identify one of his sources - which he refused to do. The U.S. Court of Appeals upheld his claim to immunity, pointing out that other avenues of disclosure had not been pursued[5] and that First Amendment rights cannot be infringed without some 'compelling' or 'paramount' state interest[6] which had not been shown. It further

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1. Ibid, at 712.
2. This should be read in the light of his earlier statement that the state would have to show 'a substantial relation between the information sought and a subject of overriding and compelling state interest'. Ibid, at 740.
3. Branzburg v Hayes, supra, at 740.
4. 470 F. 2d 778 (2d Cir. 1972), certiorari denied 411 U.S. 966, 93 S. Ct. 2147 (1973).
5. This clearly reflects the dissenting opinion of Justice Stewart in Branzburg, as described above.
6. This too clearly reflects the 'qualified privilege' (defeasible only on certain conditions) approach of Justice Stewart, ibid.

declared :

> 'there are circumstances, at the very least in civil cases[1], in which the public interest in non-disclosure of a journalist's confidential source outweighs the public and private interest in compelled testimony'.[2]

Building on this foundation - and emphasising the exceptional importance of the issues at stake - the Columbian District Court in Democratic National Committee v McCord[3] quashed subpoenas requiring reporters and management of the New York Times and Washington Post (amongst others[4]) to appear before the Committee[5] and to produce all documents in their possession relating to the Watergate break-in. Judge Richey emphasised that the proceedings were civil (as opposed to criminal); that the Committee had not shown that it had exhausted or even approached alternate avenues of information and that the cases in question were 'of staggering moment: " ... unprecedented in the annals of legal history"'[6]. Emphasising that what was in issue was the 'very integrity of the judicial and executive branches of ... Government'[7], he declared :

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1. The court thus emphasised, both here and in other passages, that the Branzburg decision had involved refusal to testify in criminal proceedings, and that the balance of interest was different in civil litigation. See Nelson & Teeter, op cit, p 332.
2. Baker v F & F Investment Co, supra, at 783.
3. 356 F. Supp. 1394 (D.D.C. 1973).
4. Also subpoenad were the equivalent staff of the Washington-Star-News and the magazine, Time.
5. This was the Committee for the Re-election of the President, which was party to a number of civil actions arising out of the break-in at the Watergate offices of the Democratic National Committee.
6. Nelson & Teeter, supra, p 332, citing the judgment of the court at 1397.
7. Ibid.

> '[t]he court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of Government no amount of legal theorizing could allay the public suspicions engendered by its actions'.[1]

Accordingly, seeing a 'chilling effect in the enforcement of the subpoenas upon the flow of information about Watergate to the press and thus to the public'[2], he ordered that they should be quashed.

Another of the qualifications expressed in the Branzburg case has also since resulted in a journalist being exonerated from disclosure. Thus, in Morgan v State[3], where a journalist had refused to disclose the source of a story regarding criticism of a chief of police (and had been sentenced to 90 days' imprisonment for contempt), the Florida Supreme Court overruled the lower court on the ground that the demand for information fell within the category of '[o]fficial harassment of the press undertaken not for the purposes of law enforcement, but to disrupt a reporter's relationship with his news sources'[4]: and hence could not be justified.

On the other hand - and notwithstanding these authorities - it must also be acknowledged that the Supreme Court has recently re-affirmed the Branzburg principle in two important decisions.

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1. Democratic National Committee v McCord, supra, at 1397.
2. Nelson & Teeter, supra, p 332.
3. 337 So. 2d 951 (Fla. 1976)
4. Ibid, at 955, citing the authority of 'the Branzburg plurality opinion'. The court was also satisfied that the information was not required for any compelling or legitimate reason, but had - on the contrary - been requested simply 'so that the authorities could silence the source'.

The first was Tribune Publ. Co v Caldero[1], in which the Court further confirmed that the requirement of disclosure may indeed apply in appropriate civil cases[2]. The second was New York Times Co v New Jersy[3], in which the Supreme Court denied certiorari in relation to Myron Farber, a reporter for the New York Times, who had refused to surrender certain notes concerning a multiple-murder: and had been convicted of contempt (for which he served 40 days' imprisonment).

But if the protection provided by the common law - as interpreted by the Supreme Court in Branzburg and its successors - is less than adequate, it must also be acknowledged that considerable efforts have been made in the United States to rectify the matter by legislation. Thus, the majority of states have adopted 'shield laws' which confer either an absolute or a qualified testimonial privilege upon those involved in the media. An example of a statute granting absolute privilege is that of Alabama (adopted as early as 1935[4]) which states :

> 'No person engaged in, connected with, or employed on any news paper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury

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1. 434 U.S. 930, 98 S Ct 418 (1977).
2. See Abraham, Freedom and the Court, 4th ed., New York 1982, p 170.
3. 439 U.S. 997 (1978); and In re Farber, 78 N.J. 259, 394 A. 2d 330.
4. See Nelson & Teeter, op cit, p 334.

> of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with or employed'.
> [1]

An example of a qualified 'shield law' is that of Illinois: which states that any person wishing to obtain information from a reporter must apply for an order removing the privilege which the statute generally confers on journalists employed by the media. The application must state 'the specific information sought, its relevancy to the proceedings, and a specific public interest which would be adversely affected if the information sought were not disclosed'[2]. In addition, the court must also be satisfied that 'all other available sources of information ha[ve] been exhausted and that disclosure of the information is essential to the protection of the public interest involved'[3].

Important as these provisions are, it must, however, also be acknowledged that - in practice - they have not always afforded the protection they appear prima facie to offer. Thus, for example, in the Branzburg case itself, Branzburg had attempted

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1. Ala. Code, Tit 7, para 370, 1960.
2. Nelson & Teeter, op cit, p 335.
3. Ibid.

to rely on Kentucky's shield law which protects newspaper employees, amongst others, from disclosing their sources of information. The Kentucky court held, however, that the journalist himself was the 'source' of the article describing the manufacture of hashish; and that the statute did not exonerate him from the duty of identifying those whom he had observed breaking the law[1]. In New Jersey, the state's shield law provided equally little protection to a journalist who refused to reveal the identity of a man who (he reported) had attempted to bribe a local housing authority official. The New Jersey court ruled that, since the reporter had disclosed the name of the latter in his story, he had (under another state evidence rule) waived his privilege in respect of the remainder of the information. He was found guilty of contempt and served 21 days in jail[2]. Even more disturbing is the view expressed by a Californian appeals court in Farr v Superior Court of California[3] that California's shield law could not restrict the '"inherent power" of courts to regulate judicial proceedings without interference from other government branches'[4]. The court thus held that Farr (a reporter for the Los Angeles Herald Examiner and later the Los Angeles Times) could not be accorded immunity from disclosure as this would amount to an interference by the legislative branch with the judiciary's power to control its own affairs; and would accordingly undermine the principle of separation of powers[5].

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1. See Branzburg v Pound, 461 S.W. 2d 345 (Ky. 1970).
2. See N.J. Stat. Ann. 2A: 84A-21 (Supp. 1970); and see Nelson & Teeter, op cit, pp 335 - 336.
3. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342, 348, (1971).
4. Nelson & Teeter, supra, p 336.
5. Ibid. Certiorari was denied by the Supreme Court: 409 U.S. 101 (1972).

The picture is not entirely gloomy, however. In In re Taylor[1], for example, the Pennsylvania Supreme Court gave an extended interpretation to Pennsylvania's shield legislation (in favour of media freedom) and held that - although the statute was expressed to protect newsmen from revealing their sources of information - it also gave them immunity against disclosure of the information itself. Thus, in appealing against their conviction for contempt for refusing to produce documents to a grand jury investigating corruption in city government, the manager and editor of the Philadelphia Bulletin argued that the word 'source' in the statute must mean 'documents' as well as 'personal informants'. The Pennsylvania Supreme Court agreed; and stressed that the legislature, in enacting the law, had 'declared the gathering of news and protection of the source of news as of greater importance to the public interest than the disclosure of the alleged crime or criminal'[2].

In summary, then, it seems that the lead provided by the United States is less clear in this than in other spheres of law relating to the media. To date, the Supreme Court has consistently refused to extend testimonial privilege to journalists; whilst lower courts, on occasion, have adopted a disturbingly narrow view of the protection provided by shield legislation. Lower courts have also, however, been quick to seize upon the qualifications expressed by the Supreme Court

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1. 412 Pa 32, 193 A. 2d 181 (1963).
2. See Nelson & Teeter, supra, p 338.

in the Branzburg case to accord reporters immunity from disclosure in a number of instances. These latter decisions - especially that relating to the Watergate break-in[1] - are of great significance; but the most important innovation in the United States has undoubtedly been the enactment of shield legislation conferring absolute or qualified privilege upon reporters. The United States has thus evidenced a different approach to source immunity of considerable intrinsic merit: and one which Nigeria would do well to bear in mind. It is of course true that if the courts in Nigeria continue to follow the approach that it is unconstitutional (by virtue of the guarantee of freedom of expression in section 36) to require journalists to disclose their sources, then legislation of this kind will not be necessary. However, if the courts should falter in this approach (whether because they consider themselves bound by the decision of the House of Lords in Granada, or for any other reason) it would be as well to remember that the approach of the United States - in legislation especially (if not in case-law) - again provides a lead well worth the following.

## 12.9. The Constitutionality of Journalists' Duty to Disclose their Sources

It remains to consider the constitutionality of the obligation resting upon journalists at common law to disclose their sources of information in court[2] proceedings. It should be noted at the

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1. See again Democratic National Committee v McCord, 356 F. 1394 (D.D.C. 1973), discussed at p 1151 above.

2. The same obligation applies also in other types of inquiry such as those conducted by tribunals or legislative committees. The term 'court' proceedings has been used throughout for convenience: but should not be regarded as limiting the ambit of the obligation to answer relevant and necessary questions - whether in the course of judicial, quasi-judicial or legislative enquiries.

outset that there is wide-spread recognition of the reality (acknowledged even by the majority of the Law Lords in British Steel Corporation v Granada Television Ltd[1]) that source immunity plays a vital part in facilitating investigative journalism and in ensuring a free flow of information to society[2]. It is therefore a moot question whether the duty of disclosure at common law can be reconciled with section 36 of the Constitution of Nigeria, which states, in broad and emphatic terms :

> 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'.[3]

The impact of this guarantee on the alleged obligation of journalists to disclose the identity of their sources has recently been considered in a number of Nigerian cases. The first of these is Momoh v The Senate of the National Assembly and others[4], decided by the High Court of Lagos State in 1980.

The applicant in the proceedings was the editor of the Daily Times newspaper, which (on 4 February, 1980) had published - as part of its Grapevine column - the following allegation :

> '"MPs, SENATORS AND CARDS (sic)
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> There are so many of these floating around these days in utter disregard for the decorum which attaches to important offices for MPs or Sena-

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1. [1980] 3 W.L.R. 774 (H.L.(E.)).
2. See p 1123 et seq.
3. s 36(1), Constitution of the Federal Republic of Nigeria, 1979, emphasis supplied.
4. (1981) 1 N.C.L.R. 105.

> tors. A few of these people bring a bad name to their colleagues by barging into the offices of permanent secretaries, company directors, chairmen or ministers, and insisting that because they are Senators or MPs they should be given contracts. Those who do this are advised to stop'.[1]

The Senate was so incensed by this that it passed a resolution on the following day, whereby it 'invited' the editor to attend its proceedings in order to 'give all details of such impropriety known to him and his staff'[2] and to 'substantiate the allegations made'[3] in the column.

The editor thereupon sought[4] an order to quash this resolution on the ground that it constituted an infringement of section 36(1) of the Constitution and its guarantee of the right to 'impart ... information without interference'[5].

Ademola-Johnson, Ag. C.J., delivering the judgment of the High Court, emphasised the wide ranging jurisdiction conferred on the courts to secure enforcement of the constitutional guarantees[6] as well as the more general power of the courts 'to hear and

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1. Ibid, at 108.
2. Ibid.
3. Ibid.
4. Ibid, at 107. The application was brought under Order 2 Rule 1(1), Fundamental Rights (Enforcement Procedure) Rules, 1979, leave to bring the proceedings having been obtained as required. See the section on the Nigerian Bill of Rights, at p 182.
5. See s 36(1), supra.
6. Momoh v The Senate, supra, at 111, where the learned judge cites the terms of s. 42, Constitution, supra, also described in the section on the Nigerian Bill of Rights, at p 180 et seq.

determine any civil proceedings in which the existence or extent of a legal right ... is in issue'[1]. He further stressed that the Senate had acted ultra vires its powers under the Constitution in summoning the editor to appear before it[2] - as the only provisions under which it might have purported to act relate only to inquiries in the exercise of its law-making powers: and such powers were clearly not in issue in the instant case[3]. He further rejected the suggestion that the legislature has 'absolute' control over its internal proceedings (and that its actions cannot, therefore, be questioned in any court of law[4]), pointing out that this principle was derived from the Westminster system of government and therefore no longer applied under Nigeria's new 'presidential' constitution: which not only clearly separates governmental power between the three different braches of government[5] and provides that each should be supreme within its own sphere[6] -

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1. Ibid, at 112, citing s 236, Constitution, supra. The court appears to have given equal weight to both these provisions in finding its jurisdiction prima facie confirmed. It is submitted, however, that the court erred in placing equal reliance on both provisions, since they are clearly designed to cater for fundamentally different situations. Thus, s 236 is meant to provide for 'ordinary' civil and criminal proceedings; whilst s 42 clearly gives jurisdiction in circumstances such as these (where fundamental rights are in issue) - and obviates any need to look beyond its terms for an appropriate basis for the exercise of jurisdiction.
2. Ibid, at 113.
3. Ibid, at 112. The only sections under which the Senate could have acted were ss 82 and 83, Constitution, supra, the precise ambit of which is further examined below. For present purposes, the important point is that both were clearly irrelevant on the particular facts - as apparently conceded by counsel for the Senate.
4. Ibid, at 114.
5. Ibid.
6. Ibid.

but also charges the courts with responsibility for ensuring that no arm of government attempts to overstep the limits of its authority[1].

Having thus disposed of the principal objections to the court's assumption of jurisdiction, Ademola-Johnson, Ag. C.J. turned to the substantive question of whether a journalist's obligation to disclose his sources constitutes an 'interference' with freedom of expression, within the meaning of section 36(1). He began by emphasising that :

> '[i]t is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law[2] and convention[3]

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1. Ibid, at 115, where Ademola-Johnson, Ag C.J. stressed that if any branch of government were to exceed its powers or act in contravention of the Constitution, it 'would be the duty of the judiciary to put it in check at the instance of any aggrieved party'.
   As regards the argument that the Senate's internal proceedings are not subject to judicial review, the court acknowledged that this general principle had been confirmed in Obi v Waziri, [1961] 1 All N.L.R. 371, but clearly thought this irrelevant in the light of Nigeria's new Constitution. It is submitted that the court was correct in rejecting the argument that its jurisdiction was excluded by virtue of this principle, but that its reasoning for so doing was misconceived. The division of powers under the Westminster system may be unwritten, but it is nevertheless clear that the functions and powers conferred on each branch of government are limited: and that the courts do have power to prevent ultra vires action. This is subject, however, to certain limitations, such as that relating to the absolute control by Parliament over its own internal proceedings - an issue which does not touch upon the division of power between the branches and therefore may legitimately be regarded as falling outside the purview of the courts: under either constitutional system. The more correct basis for rejecting the contention is (it is submitted) that the matter was not - on the facts - one of mere internal regulation of proceedings.
2. Ibid, at 113. Unfortunately, this submission is not further explained: and it seems highly unlikely that such a point would have been regulated in any way by customary law.
3. Ibid. For further comment on the meaning of this, see below.

a degree of confidentiality'[1];

and he then buttressed this by posing the question :

> '[h]ow else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification and/or disclosure?'[2]

He pointed out that the applicant's refusal to attend the Senate or to answer questions relating to his sources of information would undoubtedly have resulted in action being taken against him to force disclosure; and this, in his view, would clearly have constituted 'an interference'[3] with his right under section 36(1)[4].

He stressed that there could be no doubt 'in anybody's mind, that the 49 wisemen who formulated the Constitution of the Country were conscious of the unsavory consequences attendant on any attempt to deafen the public by preventing or hindering the free flow of information, news and/or ideas from them'[5] and

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1. Ibid. The meaning of 'convention' is also not explained. It is tempting to assume that the court had the common law in mind in making these references. If this is so, it is unfortunate that it cited no authority to support this, nor attempted to distinguish the decisions described in the preceding sections, especially the Granada case, which clearly confirm that no journalistic privilege exists at common law.
2. Ibid.
3. Ibid, at 113. Note the court's explanation that 'interference' means 'break in (upon other person's affairs) without right or invitation, meddle, hinder or prevent'; and its assertion that a 'more appropriate definition would appear to be one relating to hinder or prevent'.
4. Ibid.
5. Ibid, at 113 - 114.

concluded with the following declaration :

> 'Without straining words it appears clear that any attempt to force a person as the applicant who disseminates information through the medium of a newspaper to disclose the source of information apparently given in confidence is an interference with 'the freedom of expression without interference' granted by Section 36(1)'.
> [1]

Accordingly, the court would undoubtedly have granted the order sought, if this had still been necessary. It was not, in fact, needed, however, as the Senate had earlier rescinded its resolution. The court took pains to emphasise, however, that the view expressed by the Senate in so doing - that '[the rescision] was an act of magnanimous goodwill towards the mass media' and in no way detracted from its own competence to proceed as it had originally intended - was 'erroneous and misleading'[2].

In conclusion, the court refused to grant the Senate's request that the matter be referred to the Federal Court of Appeal[3], on the ground that it is 'a condition precedent'[4] to the making of such reference that there should be 'a substantial question of law'[5] at stake; and that this criterion was not satisfied in the circumstances. It is interesting to note in this regard the definition of 'substantive question of law' adopted by the

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1. Ibid, at 114.
2. Ibid, at 115.
3. Ibid, at 116. See also the description of the structure of the Nigerian courts in Chapter Two.
4. Ibid.
5. Ibid.

court. This was derived from an Indian case[1] which lays down the following criteria of assessment :

(i) whether the question is of general public importance;

(ii) whether it substantially and directly affects the rights of the parties; and

(iii) whether it is an open[2] question or is not free from difficulty or calls for discussion of alternate views[3].

It is implicit, therefore, in the court's conclusion that no 'substantial question of law' was raised by the application that it considered it well settled that a journalist is not obliged to disclose his sources of information; and that to impose such a burden on him would constitute an interference with the freedom to 'impart ideas and information' guaranteed by section 36(1) of the Constitution. Much as this view is to be supported and endorsed, it is unfortunate (from the viewpoint of the value of the decision as a precedent) that the court did not acknowledge that there is indeed considerable controversy surrounding the issue at common law (as graphically demonstrated by the Granada case); and that it did not examine the conflicting authorities and come to a more fully reasoned and better documented conclusion.

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1. Chunilal v Mehta V.C.B. & Co Ltd, [1962] A.I.R. 29 S.C. 1318. The court also referred with approval to the Nigerian decision of Gamioba and others v Esezi II and others, [1969] All N.L.R. 584, which defined a 'substantial question of law' as one 'in which arguments in favour of more than one interpretation might reasonably be adduced ... and one capable of being formulated with precision'.

2. See Chunilal v Mehta, supra, where an 'open' question is defined as one 'not finally settled by this court or by the Privy Council or by the Federal Court'. Translated into the terms of the Nigerian court structure, this would mean a question not finally determined by the Privy Council (to the extent its decisions are binding), the Supreme Court or other appellate courts described in the section on the Nigerian courts in Chapter Two.

continued .....

In the light of this lacuna, it is not altogether easy to evaluate the significance of the decision. On the one hand, the court was quite clear and emphatic in its declaration that disclosure of media sources would cut across freedom of expression as guaranteed by the Constitution. On the other hand, howver, it is also clear that this statement was strictly no more than an obiter dictum: for the court had previously found the resolution (which had, in any event, already been rescinded by the Senate) to be ultra vires the powers of the upper house. It must, however, also be remembered that section 42 of the Constitution gives the court the power to issue any order or declaration (in relation to alleged contravention of the guaranteed rights) as it thinks fit. Thus, the court was fully within its competence in making a substantive declaration of law in this context - even though this was not necessary for the resolution of the problem at hand. The more weighty difficulty in the assessment of the decision's value as a precedent lies accordingly in the paucity of its reasoning; and, in particular, in its failure to take account of relevant common law authorities. Moreover, an appeal against this decision (which is simply that of the Lagos High Court) has been taken to the Federal Court of Appeal[1], where the question of jurisdiction was considered of paramount importance[2]. No report of these proceedings is yet to hand, however, and this of course renders it even more difficult to formulate an

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continued:

3. See ibid. A question of law is not substantial if it simply involves the application of well settled general principles or is one in which the plea raised is 'palpably absurd'.

1. Leave to appeal must, presumably, have been obtained from the Federal Court of Appeal itself.

2. This was relayed to the writer in the course of an interview with Chief Alhaji Alade Odunewu, former Editor-in-Chief of the Daily Times, in London, on 23 December, 1982.

appropriate evaluation of the case[1].

The next Nigerian decision in this context does, however, provide a far more comprehensive analysis and review of the relevant principles and authorities. This is the case of Adikwu v Federal House of Representatives of the National Assembly and others[2], decided also by the High Court of Lagos State, in February 1982.

The applicants were the editor, publishers (and journalists in the employ) of the Sunday Punch newspaper which, in its edition of 5 April 1981, published an article captioned 'Fraud: Legislators Claim Salaries for Fictitious Staff'. It then proceeded to allege that 90 per cent of legislators (all of whom are entitled to employ a number of personal assistants[3] at varying salary scales) chose instead to draw the salaries which should have been paid to such staff by submitting fictitious names to the Clerk of the National Assembly. The article continued :

> 'Some legislators who requested anonimity (sic) and who abhor the persistence of this fraud have said that this practice was made possible by a resolution of the House which enables the Legislators to operate accounts on behalf of their personal staff'.
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> [4]

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1. Reports of Nigerian decisions are sometimes slow in reaching London, unfortunately, and this seems to have occurred in this particular instance.

2. (1982) 3 N.C.L.R. 394.

3. Thus, each legislator was entitled to eight personal aides in total (including legislative aides, confidential secretaries, field officers, office clerks and messengers.

4. Adikwu v Federal House of Representatives, supra, at 399.

Following publication of this report, the House of Representatives on 7 April 1981 directed its House Committee to investigate these allegations[1]. The Committee wrote to the editor (and other applicants[2]) requesting that he appear before it on 9 April and bring all relevant facts at his disposal which would assist the Committee in its investigation[3]. Following the editor's failure to comply with this request, the Committee wrote to him again, urging him to attend its proceedings the next day and emphasising the importance of his co-operation. Instead, the editor instituted the present proceedings in which he sought various forms of relief[4], amounting - in essence - to confirmation of two principles :

(i) that any alleged obligation resting upon newsmen 'to appear and testify before a Legislative investigating committee abridges the freedom of speech and press guaranteed under Section 36 of the Constitution[5]; and

(ii) that newsmen enjoy 'an absolute privilege against official interrogation in all circumstances'[6].

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1. Ibid, at 400.

2. Ibid, at 397. The editor (in his affidavit to the court) explained that three other journalists on the paper had also been 'invited' by the respondents to appear at diverse dates before the National Assembly, in connection with the publication of 5 April. For convenience' sake, further reference is confined to the editor's application alone, but it should be remembered that similar applications were also brought by the publishers and other journalists thus summoned to appear.

3. Ibid, at 399.

4. Ibid, at 396 - 397, where the various declarations and orders sought are set out in full.

5. Ibid, at 396.

6. Ibid. It seems thus that the applicants were seeking specific confirmation not only of source immunity in relation to the legislature and its committees, but also of a more general principle that the media are never obliged to disclose such information, irrespective of the forum in question.

In support of his application, the editor deposed that the information underlying the publication had reached the applicants untinged by any dishonesty or criminal conduct and without infringement of the respondents' rights; that the information had not been solicited and that no money had been paid for it; and that the 'source' who had supplied it had 'volunteered ... it with a keen sense of informing the public'[1] and had been promised by the applicants that his identity would not be disclosed[2].

The first substantive question dealt with by the court concerned the extent of the investigative powers conferred on the House of Representatives by sections 82 and 83 of the Constitution. Section 82 gives each House of the National Assembly the power to institute investigations[3]; but specifies that this authority may be exercised only for the following two purposes :

(i) to enable it to make new laws or expose defects in existing laws; and

(ii) to enable it 'to expose corruption ... or waste in [inter alia] the disbursement or administration of funds appropriated'[4].

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1. Ibid, at 398.

2. Ibid. There is a marked similarity between the factors thus relied upon and those considered significant by the House of Lords in determining the merits of Granada's claim to immunity. It is not altogether clear from the report to what extent the court was influenced in its decision by these particular factual circumstances, but it is interesting to note that the court described this affidavit (submitted as an afterthought) as a 'better' one than the first (which had done little more than outline the facts and allege that the obligation to disclose sources would contravene the constitutional guarantee of freedom of expression).

3. See s 82(1), Constitution of the Federal Republic of Nigeria, 1979.

4. See s 82(2)(b), ibid.

Section 83 confers on each House wide powers needed to conduct investigations for these purposes; and provides, inter alia, that either House (or a Committee appointed by it[1]) may 'summon any person in Nigeria to give evidence at any place or to produce any document ... under his control, and to examine him as a witness'[2].

The court was satisfied, on the facts, that the investigation ordered by the House of Representatives into the allegations of fraud contained in the Sunday Punch article was designed to 'expose corruption ... in the disbursement of [public] ... funds' and therefore fell within the ambit of the powers of investigation conferred on it by the Constitution[3]. It also stressed the importance of such investigative powers in ennabling a legislature to perform its functions wisely and effectively[4]; and emphasised that '[i]t is unquestionably the duty of all citizens to cooperate with an august body like the National Assembly in an effort to obtain facts which are needed for intelligent legislative action'[5]. However, it also took pains to underline the fact that section 82 is prefaced by the words '[s]ubject to the provisions of this Constitution'[6] : and, accordingly, that the

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1. Adikwu v Federal House of Respresentatives, supra, at 402.
2. See s 83(1)(c), Constitution, supra, cited ibid, at 403.
3. See Adikwu v Federal House of Representatives, ibid, at 407, and see also s 82(2)(b), Constitution, ibid.
4. Adikwu v Federal House of Representatives, ibid.
5. Ibid. It seems clear from the overall context that the court intended this to extend to facts which are needed 'for the exposure of misuse of public funds'.
6. Ibid, at 408 and see also s 82(1), Constitution, supra. It is submitted that these words (though not expressly included within s 83) must also govern the exercise of the powers conferred by the latter section to facilitate the investigation authorised by s 82.

investigative powers of the legislature may be exercised only with due regard to all such provisions, especially the guarantees of fundamental rights contained in Chapter IV[1]. These, of course, include the guarantee of freedom of expression, provided by section 36[2].

The court then turned to consider[3] one[4] of the leading United States' precedents on the alleged testimonial privilege of journalists against disclosure of their sources. This is the case of Branzburg v Hayes[5], in which the Supreme Court, by a majority of 6:3, rejected a claim for source immunity made by a journalist who (it may be recalled) had investigated and

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1. Ibid. Balogun, J. also stressed (at 413) that '[i]t would be wrong for a court simply to assume that every legislative investigation is justified by a public need which over balances any protected rights'. In illustration of this, he pointed to the absurdities which would result if appropriate checks on legislative investigations were not maintained. Thus, an investigative body, probing (for example) irregularities in election procedure with a view to amending the Electoral Act, should not be allowed to demand that the secretary or leader of a registered political party should produce its register of members. Nor should any private citizen be asked to disclose what political party he had voted for. Examples of such 'none permissible usage of Legislative power of investigation could be multiplied' - and this showed clearly that the powers of any such investigating committee could not be regarded as limitless: and should always be exercised in conformity with the Constitution.
2. See ibid, at 401.
3. Ibid, at 408. It is submitted that this reference to United States' precedent is particulary significant; and shows that Nigerian courts (no doubt under the influence of the 1979 Washington-style constitution) are beginning to seek guidance to an increasing extent from the judgments of the United States' Supreme Court. It is, of course, a major premise of this dissertation that this trend is to be encouraged to the full: and this point is further discussed in due course.
4. Ibid. Other leading United States' decisions have, of course, previously been discussed.
5. 408 U.S. 665 (1972).

reported on the production of hashish from marijuana and refused (before a grand jury) to disclose the identities of the individuals he had observed engaged in this process). The majority Opinion of the court emphasised that the media enjoy no special privilege in a number of respects[1] and pointed out that '[a]t common law courts [have] consistently refused to recognise the exercise of any privilege authorising a newsman to refuse to reveal confidential information to a grand jury'[2]. It accordingly declined to 'grant newsmen a testimony privilege that other citizens do not enjoy'[3].

Strong dissents from this Opinion were expressed by three members of the Court. Justice Stewart observed ('convincingly', in the view of the Nigerian court, as further explained below) that :

> '"[t]he court's crabbed view of the First Amendment reflect[ed] a disturbing insensitivity to the critical role of an independent press in our society"'.[4]

It continued :

> '"Not only will this decision impair performance of the press's constitutionally protected function, but it will, I am convinced, in the long

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1. For example, the publisher of a newspaper has 'no special privilege to invade the rights and liabilities of others (sic)' and 'the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally'. See Adikwu v Federal House of Representatives, supra, at 408, citing the majority opinion in Branzburg v Hayes, supra.
2. See ibid, citing Branzburg, ibid.
3. Ibid.
4. Ibid.

> run, harm rather than help the administration of justice"'.
> [1]

He further stressed - in words with which Balogun, J. strongly identified himself[2] and which therefore merit reproduction in full - the importance of ennabling the media to maintain confidentiality in relation to their sources :

> '"The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public .... As power and public aggregations of power burgeon in size and the pressures of conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion.... A corollary to the right to publish must be the right to gather news. This right implies, in turn, a right to a confidential relationship between a reporter and his source. This follows as a matter of simple logic once three factual predicates are recognised: (1) newsmen require information to gather news; (2) confidentiality is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) the existence of an unbridled subpoena power will either deter sources from divulging information or deter reporters from gathering and publishing information"'.
> [3]

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1. Ibid.
2. See ibid, at 410, where Mr Justice Balogun asserts that he 'take[s] the stand of those who dissented in that [i.e., the Branzburg] case'.
3. Ibid, at 409 - 410, citing Branzburg v Hayes, supra.

Justice Douglas, in a separate dissent (also cited with approval by the Nigerian court[1]) warned in addition of the dangers of ever more pervasive government power and stressed that the people would be the victims once 'the fences of the law and tradition that has protected the press [were] broken down'[2].

The dissenting views in the case of Branzburg v Hayes are particularly significant because of their adoption, by Balogun, J., as reflecting the approach which should be taken by Nigerian law in this regard. The learned judge stressed that he did so 'only after a passionate deliberation of the principles involved, and having regard to the specific language of the American Constitution there in question[3] and the provisions of Chapter IV ... of the Constitution of the Federal Republic of Nigeria 1979'[4]. Apropos the latter, Balogun, J. emphasised that section 36 of the Nigerian Constitution guarantees the right 'to express and communicate ('to impart ideas and information') without interference'[5]: and subject only to the limitations and exceptions expressly incorporated within it[6]. Accordingly, the powers of investigation conferred upon the House of Representatives did not permit it (or any committee established by it)'to require a newsman to disclose his source of information, except in grave and exceptional circumstances, e.g. the security of the State'[7] - which did not arise in the

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1. See ibid, at 410.
2. Ibid, citing Branzburg v Hayes, supra.
3. This reference, of course, is to the First Amendment, with its emphatic declaration that 'Congress shall make no law abridging the ... freedom of the press'.
4. Adikwu v Federal House of Representatives, supra, at 410.
5. Ibid.
6. Ibid, at 411. These exceptions have, of course, been described in full on the section on the Nigerian Guarantee of Freedom of Expression in Chapter Two.

continued .....

present case[1].

Balogun, J. then acknowledged that a contrary conclusion (in relation to court[2] proceedings) had recently been reached by the House of Lords in the United Kingdom in British Steel Corporation v Granada Television Ltd[3]. However, he clearly disagreed with the majority judgment[4] and preferred to endorse the dissenting view of Lord Salmon[5]. He cited with approval the judgment of the latter: especially his Lordship's emphasis that the media's immunity from disclosure of their sources has long been recognised - except in extraordinary circumstances (such as those in the Clough[6] and Mulholland[7] cases in which national security was at stake); and that such immunity is essential to a free press and the continued flow of important information to the public[8].

Quoting the words of Lord Denning, M.R. in the Court of Appeal in the Granada case (which had also been approved by Lord Salmon[9])

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7. Ibid.

1. Ibid.

2. Ibid. Although Balogun, J. stressed that the Granada case had dealt with the application of the rule in court, there seems no reason, in principle, for distinguishing between such proceedings and those before a legislative investigatory committee (or other tribunal).

3. [1980] 3 W.L.R. 774 (H.L.(E.)).

4. See Adikwu v Federal House of Representatives, supra, at 411, where Balogun, J. described the majority judgment in Granada as 'distressing'.

5. See ibid, at 412, where the court expresses its 'respectful agreement' with Lord Salmon's view.

6. Attorney-General v Clough, [1963] 1 Q.B. 773.

7. Attorney-General v Mulholland and Foster, [1963] 2 Q.B. 477.

8. See Adikwu v Federal House of Representatives, supra, at 412. Balogun, J. also agreed with Lord Salmon that the 'newspaper rule' is not confined to libel alone, but confers a more wide-ranging immunity.

9. See p 1099, above.

Balogun, J. emphasised the importance of source immunity to investigative journalism (which, in his view, had proved itself invaluable in exposing abuse and injustice) and declared that, without a testimonial privilege for journalists :

> '"Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds ... in the corridors of power ... would never be made known to the public"'.
> [1]

He accordingly concluded that :

> 'The purpose of Section 36 of the Constitution is not to erect the press into a privileged institution, but it is to protect all persons, (including the press) to write and print as they will and to gather news for such publication without interference .... If a newspaper or its editor or reporter can in normal circumstances be required by the courts or a Legislative committee or other body or tribunal to disclose the sources of information of an article published that would be tantamount to probing, censoring or interfering with press freedom. This would be contrary to Section 36 of the Constitution which guarantees to every person (including the press) freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. The courts must not be insensitive to these protected rights'.
> [2]

Having disposed of the respondents' objection that the application had been premature[3], Balogun, J. concluded that, although

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1. See Adikwu v Federal House of Representatives, supra, at 412, quoting Lord Denning, M.R. in Granada, supra, at 840.

2. Adikwu v Federal House of Representatives, supra, at 412.

3. Ibid, at 416. Balogun, J. thus asserted that the citizen's right of action under s 42, Constitution, supra, is 'ripe once there is a likelihood of a contravention of such right'. The respondents' argument to the contrary had been based, in essence, on the United States' doctrine of 'non-direct intervention by the courts' according to which the United States courts are enjoined not to intervene in any legislative in-

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'every person, including editors and reporters may be summoned to appear before an investigating committee of the National Assembly, ... such a probe cannot ... require an editor or reporter to disclose the source of the article[1]. He accordingly issued a number of declarations, the most important[2] of which confirmed the principle that 'the press cannot be compelled, save in exceptional circumstances to reveal its sources of information[3], and that no such exceptional factors were in issue in the present case[4]. To lend yet further force to this, he issued, in addition, '[a]n order of perpetual injunction, restraining the House of Representatives or a Committee thereof from ... requiring all or any of the applicants to produce any document or other thing in his possession which [would] disclose the source of the publication'[5] in question.

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vestigation (at the instance of a witness summoned to appear before such investigative body) - on the grounds that the investigation is unconstitutional, illegal or otherwise invalid - until the witness has first been placed in contempt by the investigating body and is being prosecuted for such contempt. Irrespective of the binding force of this doctrine in the United States (which had not yet been confirmed by the Supreme Court), the principle could have no application in Nigeria, in Balogun, J's view, by virtue of the express terms of s 42, Constitution, which entitles any person who alleges that any fundamental guarantee has been or is likely to be contravened in relation to him to apply to the appropriate State High Court for relief. Balogun, J. emphasised that, useful though doctrines and constitutional interpretations derived from other countries may be, they cannot prevail over the clear wording of a local enactment (particularly the national constitution); and cited Adegbenro v Akintola and another, [1962] 1 All N.L.R. 465 at 479 and Attorney-General of Bendel State v Attorney-General of the Federation and 22 others, (1981) 10 S.C. 1, at 111 - 112. For full discussion of the doctrine of non-direct intervention, see Adikwu v Federal House of Representatives, supra, at 413 - 416.

1. Ibid, at 416.
2. Ibid, at 418. The court's further four declarations are not particularly significant. They are set out in full at 418.
3. Ibid.
4. In Balogun, J.'s view, the present circumstances were neither 'grave nor exceptional, and therefore [did] not fall within the permissible limitations ... provided for under Chapter IV'. (At 411).
5. Ibid, at 418.

The significance of this decision cannot be over-emphasised. Although given only at the State High Court level, it is nevertheless a decision of the Lagos Court, which has traditionally enjoyed particular esteem. More importantly, it clearly shows an awareness of the common law rule rejecting a testimonial privilege for journalists (as reflected in the Granada case): and a determination to move away from this rule in favour of an approach which confirms the vital importance of investigative journalism and seeks to ensure the continued free flow of information which this requires - and which is of such crucial significance to society. In marked contrast to the earlier decision of the Lagos High Court in the Momoh[1] case, the judgment in Adikwu refers to both the leading common law authorities against 'source immunity' for journalists (the Branzburg[2] and Granada[3] decisions) and deliberately rejects the majority judgments in these in favour of the dissenting views expressed in each. Moreover, the court emphasises once again the importance of the constitutional guarantees (especially that relating to freedom of expression); and reaffirms its determination to provide a bulwark against any erosion of those guarantees. If any criticism is to be made of the judgment, it is perhaps that it fails to specify the type of circumstance[4] which might be special enough to warrant an order for disclosure; nor to indicate the procedure to be adopted in such an event (such as the giving of such evidence in camera or the making of an order barring

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1. Momoh v Senate of the National Assembly, (1981) 1 N.C.L.R. 105.
2. Branzburg v Hayes, 408 U.S. 665 (1972).
3. British Steel Corporation v Granada Television Ltd, [1980] 3 W.L.R. 774 (H.L.(E.)).
4. See Adikwu v Federal House of Representatives, supra, at 411, where Balogun, J. indicated that the circumstances must be 'grave and exceptional' before disclosure may be ordered: but gave no indication of what criteria should be applied in weighing their gravity.

the reporting of such evidence[1]). This shortcoming - and the resultant uncertainty it leaves in the law - are illustrated to some extent by the last of the recent trilogy of Nigerian decisions on the testimonial privilege of journalists.

In Oyegbemi and others v Attorney-General of the Federation and others[2], the three applicants were the editor, a senior reporter and the publishers and printers of the Daily Sketch newspaper. The proceedings arose out of the publication, in that newspaper, on 5 March 1981, of an article captioned 'Armed Robbers Kill Two Persons', which described a daylight attack (by a gang numbering about 20, armed with axes and cutlasses), in which a man and woman had been killed. Following this report, the editor was questioned by the police: and refused to disclose the source of his information. The following day he was arrested and charged with publication of a false report (under section 516 (sic) of the Criminal Code[3]) and with publication of a report likely to cause fear and alarm to the public (under section 21(1) of the Newspapers Law of Lagos State[4]). The second applicant was charged under s 51 of the Criminal Code (relating to sedition); and also refused to name his sources.

The applicants sought various declarations from the court, which may be summarised[5] as follows :

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1. Though such restrictions are not lightly to be sanctioned, they may (as previously be explained) be appropriate in such circumstances to help preclude the drying-up of sources.
2. (1982) 3 N.C.L.R. 895.
3. Cap 31 (Laws of Lagos State of Nigeria, 1973). This cannot be correct, however, as s 516 is concerned with conspiracy to commit felony. It is possible that the reference intended is to s 59, which governs the publication of false news with intent to cause fear or alarm to the public.
4. Cap 86 (Laws of Lagos State of Nigeria, 1973). Since both charges arose out of the same facts, this evidences a disturbing 'splitting of charges'.
5. For further details, see Oyegbemi v Attorney-General, supra, at 898.

(i) a declaration that, in their capacity as journalists[1], they could not be compelled to disclose their sources of information; and

(ii) a declaration that any person charged with the commission of a crime is entitled to remain silent under the provisions of section 33 of the Constitution, especially subsections (6) and (11)[2].

Having disposed of the respondents' preliminary objection that the applicants could not be permitted to pre-empt the criminal proceedings pending against them by bringing this civil application - an objection which the court considered unfounded as the civil proceedings could not affect the outcome of the prosecutions[3] - Balogun, J. turned next to the question of police powers and police questioning[4]. He emphasised the rights of a person arrested or detained under section 32 of the Constitution[5] and pointed out that these were buttressed by the 'separate and distinct'[6] rights conferred on a person 'charged with a criminal

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1. The third applicant could not, of course, apply as a journalist and accordingly instead sought this confirmation in its capacity as publisher and printer of the newspaper.

2. s 33 guarantees the right to fair trial, as earlier described in Chapter Eight. Whilst these provisions are of great importance in general, they do seem particularly relevant to any right of a journalist to maintain silence regarding his sources.

3. The respondents' argument was founded principally upon the authority of Imperial Tobacco Ltd v Attorney-General, [1980] 1 All E.R. 866 (H.L.(E.)), especially at 875, where Viscount Dilhorne stated that 'the administration of justice would become chaotic if, after the start of a prosecution, declarations of innocence could be obtained from a civil court'. Balogun, J. was satisfied, however, that the facts in the Imperial Tobacco case were clearly distinguishable and that the applicants were not seeking declarations of innocence in regard to the criminal charges. He also doubted whether the alleged principle was applicable in Nigeria, having regard to s 42 of the Constitution and the special protection given to Fundamental Rights. Without ruling conclusively on the point, the court thought it unlikely that a defendant in criminal proceedings would have to wait until the conclusion of those pro-

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offence' by section 33 of the Constitution. He accordingly rejected 'the astonishing submissions'[1] by counsel for the respondents that the individual's rights cease to apply on his detention for interrogation[2] and emphasised that the manner in which police investigations may be conducted is governed by the 1979 Constitution, the Judges' Rules and the law of evidence[3] - and that '[t]he police must keep within the law they enforce'[4]. He stressed that the provisions of sections 32 and 33 of the Constitution 'are intended to secure all ... including the criminal, from improper police conduct and from prosecutorial (sic) shortcuts with the law'[5]; and concluded that the 'Fundamental Rights of a person who is arrested, detained or ... accused ... are great'[6] and that he 'can never be compelled under [the] supreme law [of] the 1979 Constitution to ... make any statement against

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ceedings before being allowed to apply for redress in relation to some infringement of the Fundamental Rights guaranteed him by the Constitution.

4. Oyegbemi v Attorney-General, supra, at 908.

5. Ibid, at 902. The provisions of s 32, Constitution, are described here in some detail. The rights conferred by the section on a detainee include the right to be informed in writing within 24 hours (and in a language he understands) of the facts and ground of his arrest, the right to be brought before a court within a reasonable time, and the right to compensation and public apology if the detention is unlawful. Particularly important in the present context is s 32(2), which gives a person who is arrested or detained the right 'to remain silent or avoid answering any question until after consultation with a Legal Practitioner ... of his choice'.

6. Ibid.

1. Ibid.

2. Ibid.

3. Ibid, at 908.

4. Ibid.

5. Ibid.

6. Ibid, at 912.

his will'[1].

Balogun, J. then turned to 'the last but most important issue in th[e] case'[2] - that relating to freedom of expression and the press. He affirmed that the matter was governed by section 36 of the Constitution and by the principles he had earlier enunciated in Adikwu v Federal House of Representatives[3]. Quoting extensively from his judgment in the Adikwu case, he emphasised the importance of the press as 'one of the pillars of freedom in ... any ... democratic society'[4]; and stressed that the press could not be required to disclose its sources 'except in grave and exceptional circumstances which are justifiable under the constitutional limitations'[5] on the freedom of expression guaranteed by section 36. He confirmed that he stood by all these declarations in his earlier judgment; and that nothing in the powerful submissions of counsel for the respondents had led him to any modification of his views[6]. In particular, he rejected the contention that 'on the particular facts of th[e] case, 'public order' would justify a requirement that the first and second applicants (as persons charged with criminal offences ... sh[ould] disclose their source of information'[7]; and, whilst acknowledging the eminence of the presiding judge[8] in McGuiness v Attorney-General of Victoria[9] (who had held that journalistic privilege was

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1. Ibid.
2. Ibid, at 908.
3. (1982) 3 N.C.L.R. 394.
4. Oyegbemi v Attorney-General, supra, at 910, citing Adikwu, supra, at 417.
5. Ibid, at 909 - 910, citing Adikwu, ibid.
6. Ibid, at 910.
7. Ibid. This is a particularly significant aspect of his judgment. If every journalist who refused to disclose his sources and was then charged with some offence (as in this case) could be said to have brought 'public order' under threat - so that

continued .....

limited to the newspaper rule[1]), he preferred to base his judgment firmly upon 'the particular language of the 1979 Constitution'[2].

He accordingly declared :

> 'It seems to me to be beyond doubt that by and under the provisions of the 1979 Constitution ... particularly s 36 ..., no person or authority (not even a Court of Law) in Nigeria may require any individual, editor, reporter or other publisher of a newspaper[3] to disclose his source of information of any matter published by that individual or other person or publisher, and the individual, editor, reporter or publisher of a newspaper [who refuses[4]] to disclose his source of information ... cannot be guilty of contempt of court for refusing to disclose, ... unless it is established[5] to the satisfaction of the court that disclosure is necessary in the interest of justice, national security, public safety, public order, public morality[6], welfare of persons or for the purpose of prevention of disorder or crime'.
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a ruling for disclosure could then legitimately be made - little substance would be left in any principle of source immunity.

8. This was Dixon, J. - later Chief Justice of Australia.

9. (1940) 63 C.L.R. 73.

1. See ibid, at 102 and the earlier discussion of the case at p 1103.

2. Oyegbemi v Attorney-General, supra, at 911.

3. Ibid. The emphasis on 'newspaper' is supplied by the court and is continued through this passage. This is somewhat disconcerting, for it may be read as suggesting that source immunity cannot be claimed by the other media. The more likely interpretation, from the overall context, however, is that Balogun, J. was simply intent on distinguishing the press from the 'ordinary citizen' who does not fulfill the same vital role in society.

4. It seems from the general sense of this passage that the omission of these words is an oversight or misprint.

5. Unfortunately, the court does not clarify on whom the onus lies in this regard. It is submitted that the burden of proof should (in the interests of media freedom) be placed on the person who seeks disclosure.

6. These categories of exception are clearly derived from s 41(1)(a),

continued .....

He continued :

> 'There can be no doubt that if the press ... publishes any information which the Police upon investigation thinks is false to the knowledge of the publisher, and the Police arrest, detain or charge the publisher in that connection, the Police have power in the course of their investigation ... on complying with all the constitutional and statutory provisions in force for the protection of an accused person or a person under arrest or detention, to require (or, to use ... more appropriate language, 'to request upon caution'[1]) that the publisher shall make a voluntary statement ... and disclose the source of his information. But the Police cannot compel him to do so'.[2]

He concluded :

> 'It seems to me that when a newspaper has investigated a matter of general public interest or concern (such as it ought to make known to the public) the publication of an article upon the matter is so much in the public in-

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of the 1979 Constitution, previously described, inter alia, in the section on Nigeria's guarantee of freedom of expression in Chapter Two above.

7. Oyegbemi v Attorney-General, supra, at 911. The remaining categories - welfare of persons and prevention of disorder or crime - are not, of course, reflected in either ss 36 or 41 of the Constitution; and it is therefore difficult to reconcile the court's reference to them with its next sentence that 'unless the case falls within the permissible limitation of Fundamental Right of freedom of speech, of expression and freedom of the press provided for under the provisions of the 1979 Constitution as a whole', disclosure cannot be considered necessary. The status of these latter categories of exception is therefore somewhat doubtful. It is further submitted, as further emphasised below, that the list here provided is too wide (especially by virtue of the last two categories) and that there is a real danger that all these exceptions may drain away the substance of the 'source immunity' rule, leaving it an empty husk.

1. Ibid, at 912, emphasis supplied.

2. Ibid, emphasis again supplied.

> terest that the newspaper[1] ought not[2] to be restrained or 'interfered' with by any person or authority, solely on the ground that the information in the article originated in confidence or for any other reason not justifiable under the constitutional limitation on right to freedom of expression and the press provided for under Subsection (3) of Section 36 of the 1979 Constitution[3]. Nor should a newspaper be compelled (except in grave and exceptional circumstances, justifiable under the constitutional limitations on freedom of expression) to disclose the source of the information. The editor and reporter can rely on the constitutional shield of confidentiality'.[4]

The court accordingly declared[5] that the press - save in exceptional circumstances, as described above - cannot be compelled to disclose its sources; that no such circumstances had been shown; and that a person who is arrested and detained has a 'constitutional right to remain silent or avoid answering any question, until after consultation with a Legal Practitioner or any other person of his own choice[6]. It concluded by granting

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1. Ibid, at 913. The emphasis here is again supplied by the court, as earlier discussed.
2. Ibid. Again the emphasis is as supplied by the court. Here, however, the reason seems readily discernible.
3. Ibid. This is an interesting apparent oversight by the court. S 36(3) makes no provision for derogation from freedom of expression in the interests of public order, security, morality and so forth, all of which are now provided by s 41(1). It is a moot question therefore whether the court intended to limit the circumstances in which disclosure may be ordered in the manner this sentence suggests. It seems that the answer must be in the negative, however, especially in the light of the passage quoted above.
4. Ibid. The authority for this 'constitutional shield' as relied on by the court is further examined below.
5. Ibid, at 913 - 914. The full text of the various declarations is here set out. The first two do little more than reiterate the terms of ss 36(1) and (2) and are accordingly omitted from the summary in the text which follows.
6. See ibid, at 913.

a perpetual injunction restraining the respondents not only from requiring the applicants to disclose their sources of information for the article in question, but also from demanding such disclosure in relation to any other articles published by them in their capacity as journalists[1] - for so long as sections 32, 33 and 36 of the 1979 Constitution remained in force in their present terms[2].

The decision is greatly to be welcomed for the emphasis it places on media freedom as a bastion of democracy; for its recognition of the importance of a free flow of information to journalists; and for its robust declaration that those involved in the media are not - in principle - to be compelled to disclose their sources[3]. However, as previously noted[4], the wide range of circumstances in which disclosure - according to the court - may nevertheless be found necessary (and the inclusion - within that range - of concepts as broad as the 'welfare of people' and the 'prevention of crime or disorder') strongly suggests that the substance of the rule entitling the media to source immunity may be so eroded by all the derogations thus permitted as to leave it of little practical efficacy.

A further criticism of a more technical nature (which could,

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1. Ibid, at 914. Again, as regards the third applicant (the publisher and printer of the newspaper) this must presumably be read as meaning any article published by it in its capacity as such.

2. Ibid.

3. Other aspects of the judgment - particularly its warning against the abuse of police powers, and its emphasis (at 912) that the courts will always stand ready to defend the rights of the citizen - are equally important but do not fall directly within the ambit of this study.

4. See p 1182 n 7, above.

however, assume importance in future cases) relates to the authority relied upon by the court for the source immunity principle. In general, the court did no more than to declare that immunity from disclosure is derived from the freedom to impart ideas and information without interference which is guaranteed by section 36. No objection can be raised to this - except, possibly, as to the wide meaning of 'interference' which it implies[1]. However, in one particular passage of the judgment[2] - where Balogun, J. cites with approval his earlier judgment in Adikwu's case[3] - the court proceeds to identify the constitutional authority for the 'shield of confidentiality' conferred on journalists: and describes this as section 36(3)(a) of the 1979 Constitution[4]. Yet this subsection relates to the derogations from freedom of expression which may be authorised under laws 'reasonably justifiable in a democratic society'[5]. How then can it provide a foundation for one aspect (i.e., media immunity from source disclosure) of a more general positive right (to freedom of expression and the communication of information without interference)?

To understand the significance of this, it is perhaps necessary to set out the subsection in full; and to emphasise its place in

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1. 'Interference' prima facie connotes some more direct action: such as censorship or a ban on circulation. However, it does not seem to be stretching the meaning of the word too far to say that it may also extend to the situation in issue - for ordering a journalist to disclose his source may clearly inhibit further 'leaks'; and thus 'interfere' with his right both to receive and to impart information.
2. See Oyegbemi v Attorney-General, supra, at 910.
3. Adikwu v Federal House of Representatives, (1982) 3 N.C.L.R. 394.
4. See Oyegbemi v Attorney-General, supra.
5. See the section on the guarantee of freedom of expression, in Chapter Two above.

the scheme of constitutional protection. The subsection thus provides :

> 'Nothing in this Section i.e., s 36 shall invalidate any law that is reasonably justifiable in a democratic society -
>
> (a) for the purpose of preventing the disclosure of information received in confidence...'.[1]

The provision must also be seen in its proper context - namely, the fact that it is included after subsections (1) and (2) of section 36 (which declare the substantive rights to freedom of expression and to own, establish and operate any medium[2] for the dissemination of information)[3].

It is clear, therefore, that the subsection is intended to authorise a restriction on freedom of expression, where information (which should otherwise be capable of being communicated without interference, in terms of subsection (1)), has been received in confidence. It is in no way intended to provide a 'constitutional shield of confidentiality'[4] entitling journalists to refuse to break their confidential relationships with their sources of information by disclosing the identity of the latter. Hence, the court's reliance on the subsection in this context is clearly erroneous.

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1. See s 36(3)(a), Constitution of the Federal Republic of Nigeria, 1979.
2. This, of course, is subject to Presidential authority as regards the broadcast media, as previously explained in Chapter Four.
3. See the general discussion of the Nigerian guarantee of freedom of expression in Chapter Two.
4. Note the reference to this in Oyegbemi v Attorney-General, supra, at 910 and 913.

This must, inevitably, raise some question as to the value of the decision as a precedent for future cases. It is submitted, however, that the main ground relied upon by the court - that disclosure of sources would constitute an interference with freedom of expression, within the meaning of section 36(1) - is sufficiently clear and cogent to override this somewhat technical criticism; and that the decision accordingly has considerable significance in establishing the rule in Nigerian law that the media cannot be compelled to disclose their sources of information: except in grave and exceptional circumstances. It must, however, be emphasised that - in order to counter the more substantive criticism described above - a narrow interpretation of what constitutes 'grave and exceptional circumstances' must be adopted if the rule is to retain any practical efficacy.

One final observation must be reiterated[1]. The three Nigerian cases discussed above are all decisions of the High Court of Lagos State which (highly esteemed though it may be) is by no means the highest court in the land. Above it stand both the Federal Court of Appeal and the Supreme Court of Nigeria - and it is a moot question whether these courts (if called upon to do so) would come to a conclusion contrary to the ruling of the House of Lords in the Granada case - especially in the light of the view expressed by a number of commentators on Nigerian law that decisions of the House of Lords, on principles of common law, are still binding in Nigeria[2]. In addition, there is a

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1. See p 1165 (regarding the Momoh case) and p 1177 (regarding Adikwu).
2. See p 161 et seq.

considerable body of authority in the United States (including, of course, the decision of the Supreme Court in Branzburg v Hayes[1]) against the recognition of a special media immunity from source disclosure; and it is significant that the majority of states in that country have considered legislation necessary to provide such immunity: and this despite a guarantee of freedom of the press which is far wider (and cast in infinitely more compelling terms) than the Nigerian guarantee.

The difficulties in the way of following the lead of the Lagos High Court must therefore be acknowledged as considerable. It is nevertheless submitted, however, that the Nigerian guarantee of freedom of expression[2] does indeed provide a sufficient basis for finding the common law rule unconstitutional. The free flow of information to society is so important and source immunity so crucial in maintaining this that the rule requiring disclosure should not be acknowledged as 'reasonably justifiable in a democratic society'. Hence, it should be acknowledged that the common law rule in this context is indeed void for inconsistency with the right to 'receive and impart ideas and information without interference', guaranteed by section 36 of the Nigerian Constitution.

This, in turn, raises the question of the form the law should take instead. It is submitted that the United Kingdom legisla-

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1. 408 U.S. 665 (1972).

2. It is submitted that the United States' guarantee is also sufficient to invalidate the common law rule: and that this would, indeed, have occurred if the commitment to media freedom had been stronger in Branzburg and its successors.

tion (clearly premised on a continuing obligation of disclosure except in the circumstances mooted by the provision) is not appropriate in Nigeria: and that the courts should instead follow the United States principle (established, of course, through the shield legislation of certain states, rather than under the common law) that journalists enjoy an absolute privilege against disclosure of their sources. Only if this is acknowledged as the appropriate principle will the role of investigative journalism be safeguarded; a free flow of information to society encouraged; and individual journalists themselves be lifted from the horns of the dilemma as to duty in which the common law has previously placed them.

Last (but by no means least), it remains to pay tribute to the Lagos High Court for the stand it has taken in favour of individual liberty and freedom of the media. It must also be emphasised that its approach is much to be welcomed - and clearly points the direction which all Nigerian courts should take in future cases: not only in this context but also in other spheres of common law touching on media freedom. For it is one of the principal recommendations of this dissertation that Nigeria should move away from English precedents on the common law: and it is accordingly most encouraging to note Balogun, J.'s rejection of the majority judgment of the House of Lords in the Granada case in favour of Lord Salmon's dissenting view. It is also a major premise of this thesis that the approach of the United States of America to the interpretation of the common law in the context of media freedom provides an example which Nigeria would do well to follow. Accordingly, it is all the more

welcome to note the Lagos High Court not only deriving guidance from United States' precedents - but also (in this instance) rejecting the narrow approach taken by the majority in Branzburg v Hayes which (it is submitted) is out of keeping with the Supreme Court's general firm commitment to the value of free speech and press - and following instead the dissenting opinions in the case, in which the importance of these freedoms is accorded due weight. The significance of this shift towards the United States' approach is examined further below: and, for the present, (before leaving the topic of contempt of court in the context of media freedom) it remains to note that the rules which have been discussed in this and the preceding three chapters are by means the only aspect of this 'Protean'[1] branch of law which may affect the media.

## 12.10. The Significance of other Aspects of the Law of Contempt for Media Freedom

Within the general context of contempt of court, this study has focused on those rules of obvious significance for the media - the principles governing sub judice publication; the offence of scandalising the court; the limits within which court proceedings may be published; and the obligation of journalists to disclose their sources. Yet the law of contempt has many other aspects, as previously explained[2] - and it

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1. Thus, as may be recalled from the opening passages of Chapter Eight, 'contempt of court has been described as "the Proteus of the legal world, assuming an almost infinite diversity of forms"'. See p 695.

2. See p 696 et seq.

should always be remembered that rules with little prima facie significance for media freedom may nevertheless affect it to considerable extent. The recent United Kingdom case of Home Office v Harman[1] graphically illustrates the point.

Here, the appellant was a solicitor who had acted for the plaintiff in proceedings against the Home Office arising out of his treatment in prison in an experimental 'control unit'. During the course of these proceedings, the appellant had obtained discovery (from the Home Office) of some 2,800 documents, approximately 800 of which she had selected and prepared for use at the trial. In the course of counsel's opening speech for the plaintiff, all or 'all material parts' of these 800 papers were read out in open court, including six documents for which the Home Office had attempted to claim immunity from discovery (on the basis of public interest) and which were ultimately ruled to be inadmissible. A few days after the hearing, the appellant allowed a journalist (who was a feature writer for the Guardian newspaper) to have access to the documents which had been read out, including the confidential papers, for the purpose of writing a newspaper article which (when published) was highly critical of Home Office ministers and civil servants. The appellant had accorded the journalist access to the documents on the basis of a well-known and common practice whereby 'counsel in civil litigation ... allow reporters who have been present at the hearing to have a sight of copies of any documents dis-

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1. [1982] 2 W.L.R. 338 (H.L. (E.)).

closed by either party that are in that counsel's possession, and have been read out in court, so that the reporter may check the accuracy of the report of the proceedings that he is preparing'[1]. The Home Office contended, however, that the appellant had thereby been guilty of contempt of court: on the ground that she had breached her implied undertaking to the court not to use the documents obtained on discovery for any purpose other than that of the particular proceedings. The trial court found her guilty of contempt, but imposed no penalty (in view of the fact that she had believed her conduct justified by the common practice described above). Her conviction nevertheless had important implications for media freedom: and she appealed to the Court of Appeal (which confirmed the trial court's decision) and thence to the House of Lords. Their Lordships, by a majority of 5:3, agreed that her conduct constituted a contempt.

In the view of the majority, the appellant - as a solicitor and officer of the court - in obtaining discovery of documents in the course of litigation, gave an implied undertaking to the court not to use the documents 'for any purpose other than the proper conduct of the action'[2]; and the fact that the documents had been read out in open court did not bring that implied undertaking to an end. Hence, breach of the undertaking (by

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1. Ibid, at 345.
2. Ibid, at 339.

showing the documents to the journalist) constituted a civil contempt. The minority[1], by contrast, emphasised that once the documents had been read out in open court, they had entered into 'the public domain'[2] and that '[o]nce they had become public knowledge, freedom of comment concerning them enure[d] to the public at large'[3]. Accordingly, there could be no reason 'why the undertaking given when they were confidential should continue to apply to them'[4]. Even if the undertaking had continued in force (which the minority did not accept), this 'could not have prevailed to prevent their publication to the world at large'[5], once they had been read out aloud - without restriction[6] - in open court[7].

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1. The dissenting minority comprised Lord Scarman and Lord Simon of Glaisdale.

2. Ibid, at 353, per Lord Scarman (who delivered the dissenting judgment).

3. Ibid.

4. Ibid.

5. Ibid, at 360.

6. Thus, the court had given no indication that the documents (including those ruled inadmissible) were not to be reported by the media. Cf R v Socialist Worker, Printers and Publishers, Ltd, [1975] 1 Q.B. 637 (D.C.) and Attorney-General v Leveller Magazine Ltd, [1979] A.C. 440 (H.L.(E.)).

7. Home Office v Harman, supra. Lord Scarman further emphasised (at 357 - 358, ibid) that, under Article 10 of the European Convention on Human Rights, as interpreted by the European Court in The Sunday Times v United Kingdom Government, [1979] 2 E.H.R.R. 245, the United Kingdom had undertaken to uphold the right to freedom of expression: and that this right could only be circumscribed by rules which are necessary in a democratic society to secure certain interests, including the prevention of the disclosure of information received in confidence. Once the documents had been read out in open court, it could hardly be argued that there was 'a pressing social need to exclude the litigant and his solicitor from the right available to everyone else to treat as public knowledge documents which have been produced and made part and parcel of public legal proceedings'.

It is not proposed to examine the judgment in detail, for the decision turned primarily on the rules pertaining to discovery and the extent of a solicitor's implied undertaking to the court in such circumstances[1]. The case clearly demonstrates, however, that aspects of the law of contempt with little apparent importance for the media may nevertheless assume considerable significance for press freedom. The practical outcome of the decision is to cast grave doubt on the legality of the common practice (described above) whereby journalists are able to obtain from counsel a sight of documents which have been read out in open court: yet this practice is undoubtedly of great assistance to the media in fulfilling their important role of reporting court proceedings. It is true that the majority gave the assurance that the use of documents by journalists for the purpose of checking the accuracy of their reports would not be held to constitute contempt, under the de minimis principle[2]; but it must also be noted that the limits of this concept are not easy to define: as the majority acknowledged[3] - but then appeared to brush aside[4].

The further - and yet more disturbing inference from the decision - is that a journalist in the position of the Guardian's

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1. For a full account of the decision, see Arlidge and Eady, op cit, pp 245 - 251.

2. See Home Office v Harman, supra, at 348, where Lord Dip- stressed that it would always be open to the court, in the exercise of its discretion, to dismiss a motion for contempt brought in such circumstances. This may be so: but it is hardly a satisfactory solution in principle.

3. See ibid, at 367, where Lord Roskill acknowledged that 'there may be cases where the line is difficult to draw'.

4. See ibid, at 350, where Lord Keith of Kinkel suggests that 'if there should be any reason to doubt whether the party who had disclosed the documents under discovery or his legal advisers would approve of its being shown to the journalist, it should not ... be done without such approval'. Such a proposal - with respect - is hardly practical; and entails a serious impediment to freedom of the media.

feature writer cannot safely obtain sight of documents read out in open court from either counsel or solicitors, but must instead wait until 'transcripts of mechanically recorded speeches [in proceedings] are obtainable from the official shorthand-writers'[1]. This is not only expensive but also time-consuming: and may therefore preclude publication of matters of great public interest (as the Home Office use of 'control units' and other aspects of its policies and procedures undoubtedly was) until after the concern sparked by particular litigation has died. In such circumstances, freedom of the media must undoubtedly suffer. Moreover, the situation thus engendered is highly anomalous - as the majority was compelled to concede. The majority thus acknowledged that if a transcript of the proceedings had already been available at the time the appellant made her bundle of documents available to the journalist, there would have been little difference in content between the two sets of documents. It would clearly have been quite legitimate for the journalist to have consulted the official transcript - yet it was contempt of court for the appellant to show him the selfsame material. The majority considered this anomaly of minor significance compared with the appellant's implied undertaking to the court. Lord Scarman, by contrast, was unable to accept the notion of 'a guilty left hand' (giving the journalist the documents obtained on discovery) and 'an innocent right hand' (giving him the notional transcript). In his view, '[r]ights and duties in the field of fundamental freedoms [could] not depend upon such distinctions'[2].

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1. Ibid, at 367.
2. Ibid, at

In conclusion, it is noteworthy that the minority judgment is clearly more in line with the views of the Law Commission in its recent report on Breach of Confidence. It did not believe that 'civil liability for breach of confidence should persist after the information to which the relevant obligation of confidence relates has been published in open court'. Instead, the Commission stressed that 'everyone ought to be able to rely, so far as any civil liability for breach of confidence is concerned, on the fact that the information in question has been published in open court'[1] (always provided, of course, that it had been so published both orally and without restriction on its further publication). There is sound sense in this recommendation: and it is to be hoped that this approach (similar to that of the minority in the Harman case) which would be followed in Nigeria should a similar case of alleged contempt of court arise for adjudication.

It is accordingly submitted that whenever the "Protean" law of contempt threatens some aspect of media freedom in this kind of indirect way, the Nigerian courts should be fully alive to the danger to freedom of expression which this represents; and should only allow any interference with publication where this can be shown - echoing the general approach of the United States' Supreme Court - to be necessary to avert a clear and present danger. Only if Nigerian courts maintain sensitivity

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1. Ibid, at 354 - 355, per Lord Scarman, citing the Report of the Law Commission.

to the importance of freedom of expression and an awareness of the myriad ways in which it may be placed at risk can the constitutional guarantee of the right to 'receive and impart ideas and information without interference' attain true meaning and real practical significance.

# C O N C L U S I O N

It remains to draw together the threads of this study into a more integrated whole. It has begun by examining the value of freedom of the media and what this concept signifies in developing and developed nations alike; has sought to introduce Nigeria as a country and to provide some insight into her history, legal system, bill of rights and guarantee of freedom of expression; has attempted to provide an overview of media freedom under laws of pre- and post-colonial origin; and has endeavoured to analyse in some depth the more important legal restraints on media freedom: viz., licensing and regulation of the media, the law of sedition, defamation in both its civil and criminal aspects, and contempt of court in the four main areas in which it impinges on media freedom.

As previously explained, the laws selected for special study have been chosen because they are clearly part of Nigeria's colonial heritage: in that they are derived (in the main) from legislation of pre-independence origin or have their source in the common law of England which applies throughout Nigeria by virtue of the latter's colonial past. These laws have particular significance: for they have not only been introduced into Nigeria from the United Kingdom but have also become part (in the same or substantially similar terms) of the law in the great majority of Britain's one-time dependencies. The populations of these countries (now mainly independent members of the Commonwealth) number one thousand million - one quarter of the world's entire

populace[1]. The colonial process has thus taken the common law of England far beyond the small island of its birth, and has spread it far and wide across the globe. Yet this same common law is a product of centuries of piece-meal and haphazard development, in which (by contrast with civil law systems) little thought has been directed to the appropriate principles which ought to govern human society, and attention has been focused on the gradual expansion of case law to cater for the demands of changing times.

This process may have been adequate for the needs of pre-industrial society, but the post-industrial age - particularly the twentieth century - has been a period of rapid transition, unprecedented in the history of mankind: and the common law is still struggling to loose the grip of the past and rise to meet the challenge of the future. Many of its principles are, of course, fundamentally sound and stand in no need of reform, being fully capable of meeting and accomodating the changing conditions of the times. But other aspects of the common law seem out of step with modern thinking and (within the sphere of media freedom at least) to be premised upon an undue and revential awe for the authority of government in all its branches (legislative, executive and judicial). Hence the broadly framed law of sedition which (in Britain's ex-colonies has been given an even wider ambit through elimination of the requirement of incitement to violence); hence the law of criminal defamation, with its various presumptions against an accused, which - on many

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1. The Times, 8 October, 1981.

occasions in the past - has been used to punish criticism of the executive and its policies; hence the offence of scandalising the court, which penalises the imputation of bias (that most common of human failings) on the part of the judiciary.

In many other respects, the common law appears equally in need of radical re-thinking. Why should the plaintiff in civil defamation be excused the burden of substantiating crucial elements of his claim - contrary to the general rule which applies in other branches of tort? Is the premise underlying the sub judice rule - that jurors, parties, witnesses (and other participants in pending proceedings) will be unduly influenced by comment on the litigation - substantiated in reality? Is the uncertainty surrounding the reporting of judicial proceedings by the media to be further tolerated? And is it truly necessary to ban tape-recorders and television cameras from courtrooms - particularly in societies where illiteracy is still high and the open administration of justice can have little meaning unless it can either be heard or (literally) be seen to be done? Will society not ultimately be much the poorer for demanding that journalists disclose their sources - thereby disrupting the free flow of information to the larger community?

The defects of the common law rules within the sphere of media freedom extend far beyond those highlighted above. They have, of course, been identified at some length in the course of this study: and it is not proposed to reiterate any detailed analysis here. Suffice it to submit that the case for reform has been sufficiently well proven: and that the most important question

which remains is to determine the direction such reform should take. Again, detailed recommendations in this regard have been made at a number of points in this study: and there would be little utility in attempting to summarize them here. One noteworthy feature which emerges time and again, however, is the marked contrast between the "traditional" common law approach and the manner in which the law has been interpreted in the United States of America. From intrinsically the same material, a fundamentally different set of rules has been moulded: and the law has been transformed to give (in principle if not always in practice) a firm and clear commitment to media freedom - and to the notion that debate and discussion on matters of public interest should be robust, wide-open and uninhibited. The experience of the United States thus provides an important lead for other common law jurisdictions; and sets a practical and living example of the diametrically different direction the common law is capable of taking.

The United States' lead is thus well worth the following: and it appears that the time is now appropriate for Nigeria to take this step. Nigeria has already looked to the United States for guidance: and has thus adopted a 'Washington'-style constitution which may well prove more suited to her needs than the 'Whitehall' model under which she attained her independence. It is accordingly fitting that Nigeria should now seek further guidance from United States' case law as well (particularly the decisions of its renowned Supreme Court); and should build upon this foundation to redress the present deficiencies of the common law she has inheri-

ted. It is heartening to note that this process has already begun, as evidenced by the recent decisions of the Lagos High Court in the context of journalists' duty to disclose their sources: and it is submitted that this trend should be continued and accelerated. If Nigeria adopts the course suggested, then she may again (as when she introduced her Bill of Rights in 1959) provide a lead to other new nations of the Commonwealth, faced with essentially similar difficulties under the common law they, too, have inherited from the United Kingdom. The implications for one-quarter of the world's population may ultimately be profound.

It now remains to acknowledge certain of the lacunae of this study itself. It may be objected that too much prominence has been given to the rights of the media: and too little to their responsibilities. To some extent, such criticism is valid: for responsibility is crucial and freedom of the media without such sense of duty and commitment to society may prove destructive rather than beneficial: especially given the powerful influence of mass communications in the modern world. It is submitted, however, that such duty and commitment cannot be attained within a framework of laws which constrain and restrict the media, but can only be developed through the adoption of voluntary codes of conduct aimed at fostering a deep-rooted pride in the proper performance of the vital functions of the media. Responsibility is best engendered in an atmosphere of freedom: for only where there is choice can responsibility have real meaning. Hence, the necessary sense of responsibility should be promoted through the establishment of autonomous and independent media councils

(free from all control by government) to set and maintain standards of reporting; to guard against excessive intrusion into privacy; to discourage sensationalism and 'cheque-book' journalism; to formulate suitable principles (by consensus with bench and bar) for reporting court proceedings and commenting on cases (so as to strike an appropriate balance between free press and fair trial); to encourage full coverage of events and issues of national and international importance; to promote the canvassing in equal measure of opposing views on such matters; to utilize the potential of the media for education and development (within a context of free choice rather than adherence to autocratic governmental ruling); and to generate a profound commitment to the principle that the role of the media is primarily to inform: and to do so - at all times - in an objective and impartial manner.

Little apology is thus tendered for the omission from this study of detailed analysis of how this should be achieved: for this dissertation is primarily concerned with the laws which presently regulate and control the media: and it needs no further emphasis that legal restrictions and restraints are not appropriate vehicles for the promotion of responsibility. This lies outside the proper ambit of the law: except, of course, to the extent that legal rules should provide a framework of freedom in which true responsibility may be fostered, rather than its semblance coerced.

Further, it remains to acknowledge that this study has made no attempt to deal with two further problems of great and increasing

magnitude in the context of media freedom. These are the problems of maintaining privacy in an increasingly intrusive society; and of attempting to ensure - in the face of mounting dangers to peace and increasing development of technologies which will shake the very foundations of present society - greater public access to sensitive information presently regarded by governments as their sole and legitimate prerogative. These lacunae are greatly regretted: but the constraints of time and space have militated against an attempt to cover all aspects of media freedom; and - given the need for selection - it has seemed more important to focus on those laws which have particular impact on media freedom in Nigeria today.

Finally, it must be acknowledged that the most pervasive control over the media in Nigeria at present stems from the current large-scale ownership of the print media; and the exclusive government monopoly over the vital electronic media (which alone have the capacity to reach the illiterate majority). It has previously been recommended that the constitutional requirement for Presidential authority for the establishment of such electronic media should be amended to facilitate the acquisition of the requisite licence. Yet even if this change is implemented, however, the reality will remain that legal principle cannot alter economic constraints: and it must accordingly be acknowledged that the cost of establishing such broadcasting services may well render this impracticable. Even within the context of the print media, it must be recognised that the cost of newsprint and the difficulty of obtaining adequate supplies may effectively exclude any real alternative to government ownership for many years. Governments in Nigeria (at federal and state level) should therefore be all

the more willing to accept and acknowledge that their primary duty is to the people of Nigeria, that they should not abuse their position of power in relation to the media, that instead their commitment in the interests of the country as a whole should be to the promotion of vigorous debate which should indeed be robust, wide-open and unrestricted by laws of the kind described in this study. It may be argued that the majority of Nigerians are not ready for such freedom: but such fundamentally derogatory and paternalistic sentiment should not be allowed to prevail. Government of the people, by the people and for the people remains the only effective safeguard against tyranny and corruption; and the information so crucial to such decision-making should be made freely available to the people so as to enable them to exercise their human faculties of choice - and to realise their full potential for rational and intuitive self-development.

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